VOL. XVI. **1893.**

THE

MYSORE LAW REPORTS.

CONTAINING

CASES DETERMINED BY THE

CHIEF COURT OF MYSORE,

THE COURT OF THE JUDICIAL COMMISSIONER OF COORG

AND

THE COURT OF THE BRITISH RESIDENT IN MYSORE.

EDITED BY

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JUDGES OF THE CHIEF COURT.

CHIEF JUDGE:

T. R. A. Thumboo Chetty.
A. Ramachendra Iyer (*Offg.*)

JUDGES:

A. Ramachendra Iyer.
P. N. Krishna Murti.
C. Meenacshaya (*Offg.*)

RESIDENT IN MYSORE AND JUDICIAL COMMISSIONER OF COORG.

Colonel P. D. Henderson, C.S.I.

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THE
MYSORE LAW REPORTS.

APPELLATE CIVIL.

SECOND APPEALS.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges,

NAGANA SETTY (PLAINTIFF) *v.* SUBANA AND ANOTHER (DEFENDANTS).* 1893 *January* 27

Execution Sale—Confirmation—Certificate—Limitation Act (XV of 1877) Sch. II, Art. 178—Code of Civil Procedure (XIV of 1882) s. 316 and Sch. IV, Form 150—Title.

Held, that the title of a purchaser at an execution sale vests from the date of the sale-certificate, which is the date of confirmation of the sale.

Also, as it is imperative on the courts to grant a certificate under s. 316 of the Code of Civil Procedure, the Limitation Act does not apply to an application for grant of a sale-certificate, which application may be made at any time. *Gangaram* v. *Rudranna*(1) followed.

A sale becomes absolute on confirmation, and a subsequent purchaser has no title as against the original purchaser merely because the latter holds no certificate or did not obtain one till after the second sale and more than three years after the sale to himself. [Compare *Seshaya* v. *Komaria*(2)].

The facts and contention of the parties appear clearly from the judgments.

* Appeal from appellate decree No. 63 of 1892 against decree No. 130 of 1891 of Mr. C. Cress, District Judge of Nagar, dated the 20th day of April 1892, affirming decree No. 765 of 1890 of Mr. P. Venkata Rao, Munsiff of Chickmagalur, dated the 30th day of June 1891.

(1) 14 M. L. R., 216; and 15 M. L. R. App., ii.

(2) 15 M. L. R., 233.

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The suit was one for possession of a house which the plaintiff had purchased from defendant No. 1, the purchaser at a court-sale held in 1882. The sale was confirmed within a month, but no sale-certificate was granted till eight years later, previous to which (in 1888) defendant No. 2 had purchased the same property at another execution-sale. He withheld possession from the plaintiff on the ground that the latter's vendor had no certificate at the time of the plaintiff's purchase and did not obtain one or apply for one till more than three years after the execution-sale, so that he had no title to confer on the plaintiff at the date of the latter's purchase; and the subsequent certificate was of no avail having been asked for and granted after the time (three years) limited for such applications.

The Munsiff dismissed the suit, holding that the plaintiff's vendor should have applied for a sale-certificate within three years from the sale to him and that the subsequent grant of a certificate was invalid and did not heal his defective title. The Munsiff disposed of the question of limitation in the following terms:—

In this case an auction-sale in favor of defendant No. 1, Janardhania, was confirmed so far back as the 13th March 1882. He did not obtain the sale-certificate till the 24th January 1890. Defendant No. 1, the auction-purchaser, not having obtained the certificate of sale till after seven years from the date of the confirmation of the sale, had no title to convey to the plaintiff. Under sch. II art. 178 of the Indian Limitation Act, defendant No. 1 should have applied for the sale-certificate within three years from the date of the confirmation of the sale, which was on the 13th March 1882. Under s. 316 of the Code of Civil Procedure defendant No. 1's title as auction-purchaser would begin from the date of the certificate and not before. Defendant No. 1 having thus acquired no title to the property purchased by him, he had no right to convey the same to the plaintiff. Under the combined

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authority of the judgments of the Chief Court in *Gaddappah* v. *Gungappah*(1) and *Abdul Nabi* v. *Hindu Bank*(2), the application for a certificate of sale by defendant No. 1 was time barred and the granting of the certificate was therefore not legal. Having regard to the latest Full Bench Judgment of the Chief Court, above referred to, I would find on the first issue that the sale to the plaintiff by defendant No. 1 is not a valid sale and therefore not binding on defendants Nos. 2 and 3.

The result is that the plaintiff is not entitled to the relief sought and his suit must be dismissed with costs.

On appeal, the District Judge affirmed the decree of the Munsiff, the material portion of his judgment being as follows :—

* * *

On the 11th January 1882 defendant No. 1 purchased certain property at a court-sale, his rights in which he conveyed to the plaintiff on the 11th October 1889.

Meanwhile (*i.e.*, in 1888) the property had been sold in execution of another decree, when it was purchased by one H. Narasimia from whom it was passed through various hands to defendant No. 2.

The sale under which the plaintiff claims was confirmed on the 18th March 1882 but no certificate was applied for or obtained until the 24th January 1890, or nearly eight years after the confirmation of the sale.

The questions for decision now are whether the plaintiff has any right to sue for possession of the property, and whether his suit is time-barred or not.

There are a number of conflicting decisions on the points involved, which I shall now proceed to consider.

In the case of *Siddanna* v. *Mooneappa*(3) Mr. Plumer held that when a purchaser had subsequent to a court-sale parted with his rights, the sale-certificate obtained by him was of no avail against a subsequent *boná fide* purchaser.

In *Gaddappah* v. *Gungappah*(1) a Division Bench held that three years is the proper period of limitation for an application for a sale-certificate, and that the Munsiff acted illegally in granting a certificate which was applied for after the expiration of such period.

Soon after the Full Bench held in *Soobba Row* v. *Gopalia*(4) that

(1) 7 M. L. R., 204. (2) 12 M. L. R., 286.
(3) 5 M. L. R., 219. (4) 8 M. L. R., 292.

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the court had no discretion to refuse to grant a sale-certificate applied for at any time by an auction-purchaser.

This decision was somewhat modified, but without being expressly referred to, by the Full Bench in the case of *Abdul Nabi v. Hindu Bank*(1) wherein it was held that an application for confirmation of sale and for a sale-certificate, presented after more than three years, was time-barred.

The present applicant's advocate argues that, as the sale under which the plaintiff claims the property was confirmed on 13th March 1882, just after the expiry of two months from the date of sale, the delay in applying for and obtaining a certificate cannot affect his title to the property, though it may have deprived him of his summary right to recover possession by means of execution under s. 318 of the Code of Civil Procedure.

Per contra, the advocate for the respondent urges that unless the auction-purchaser obtains a sale-certificate he possesses no legal title to the property, and if a certificate be legally granted after the expiration of the limitation period no title is thereby conferred.

I think this reasoning is correct. The object of the Limitation Act is to prevent the inconvenience and hardship which would arise from the urging of stale claims, and if an auction-purchaser chooses to allow his rights to lapse by failing to obtain a certificate within three years, he has only himself to blame for any loss he may suffer.

Section 316 of the Civil Procedure Code provides that the title to the property sold shall *vest in the purchaser from the date of such certificate.*

Section 318 allows delivery of the property to be made after a certificate has been (properly) granted (within the Limitation period).

Now at the date of the sale-certificate in the present case, there was no title to vest in the auction-purchaser through whom the plaintiff claims, for defendant No. 2 had previously purchased the owner's rights at a subsequent court-sale.

My view of the case, in connection with the rulings and sections quoted, is that if and when an auction-purchaser suffers his rights to lapse by failing to apply for and obtain a certificate within three years from the date of sale, he loses all title which may legally be enforced against subsequent purchasers.

I therefore uphold the Munsiff's decree, and dismiss this appeal with costs.

(1) 12 M. L. R., 286.

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The Judgments of the Chief Court were as follows:—

THUMBOO CHETTY, C. J.—The suit house was sold in execution of a decree and purchased by defendant No. 1 on the 11th January 1882. The sale was confirmed on the 13th March 1882. Defendant No. 1 obtained the sale-certificate on the 24th January 1890, but, before obtaining the certificate, *i. e.*, on the 11th October 1889, defendant No. 1 sold the house to the plaintiff, who now sues for possession.

The courts below dismissed the suit on the grounds —(1) that defendant No. 1's application for certificate was not preferred within three years from the date of confirmation and was barred under the Limitation Act, sch. II, art. 178; (2) that the property was sold in execution of another decree and purchased by defendant No. 2 in 1888, which was prior to the date of the certificate (24th January 1890); (3) that on the date of the certificate, there was no title to vest in defendant No. 2, and, therefore, the plaintiff acquired no title by reason of the sale by defendant No. 1.

The principal question that was argued before the Full Bench was, whether the certificate granted to defendant No. 1 was of no avail, because it was applied for and obtained after the expiration of three years from the date of confirmation of sale. During the arguments before us, neither the appellant's advocate nor the respondent's advocate referred to the latest decision of this court in which all the previous rulings and decided cases were considered, *Gangaram* v. *Rudranna*(1). For reasons

(1) 14 M. L. R., 216; and 15 M. L. R. App., ii.

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therein stated, which I consider it unnecessary to repeat here, I am of opinion that it is imperative on the courts to grant a certificate under s. 316 of the Code of Civil Procedure, and that article 178 of Sch. II of the Limitation Act does not apply to an application for grant of a sale-certificate.

Under s. 316 of the Code of Civil Procedure the certificate shall bear the date of confirmation of the sale and the title to the property shall vest in the purchaser from the date of such certificate. Form No. 150, prescribed by the Code, apparently intended that the certificate should bear the same date as that of the confirmation of sale. The date of issue of the certificate need not be inserted, and even if inserted, the date of confirmation must be regarded as the date on which the certificate was granted, and the title vests in the purchaser, according to law, as clearly laid down in s. 316, from the date of the certificate, which is the date of confirmation of sale.

In the present case, the certificate granted to defendant No. 1 bears the date of confirmation of sale and the title vested in defendant No. 1 from such date. This certificate is duly registered, and, as held by the Bombay High Court, a registered certificate, though issued three years after sale, is valid and admissible in evidence. *Yeshwant Baburav v. Govind Shankar*(1). *See* also *Devidas Jagjivan v. Porjada Begam*(2). The District Judge was therefore wrong in holding that defendant No. 1's title did not vest from the date of confirmation of sale. As a prior purchaser at a court sale, defendant No. 1's

(1) I. L. R. 10 Bom., 458. (2) I. L. R. 8 Bom., 377.

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title was valid as against defendant No. 2, the second purchaser. The ground upon which the courts below dismissed the plaintiff's suit being untenable, the decrees of the lower courts must be reversed and the suit remanded to the court of first instance for reinvestigation and decision on the merits. Costs up to this will abide the result.

KRISHNA MURTI, J.—I agree to the order proposed by the Chief Judge. So far as this court is concerned, the ruling in *Soobba Row* v. *Gopalia*(1) is binding. The date of that decision is 1885 and nothing has since transpired to affect it. The Bombay High Court have also held a similar opinion. *Hira Ambaidas* v. *Tekchand Ambaidas*(2). I considered all these cases and, even without reference to the case of *Soobba Row* v. *Gopalia*(1), I expressed my opinion that Art. 178 of Sch. II of the Limitation Act did not apply to such an application, in the case of *Gangaram* v. *Rudranna*(3). I have again considered this point by the light of the elaborate and lucid arguments addressed to us by the learned advocates on both sides and see no reason to alter my opinion. The decision of this court in *Siddanna* v. *Mooneappa*(4), referred to by the District Judge, went on the ground of fraud and cannot be deemed a precedent applicable to the present case. I have no hesitation in holding that the application for a sale-certificate need not be made within three years from the date of the confirmation.

This sale was confirmed within about two months of the sale and it became then absolute. The question as to whether a certificate of sale is simply

(1) 8 M. L. R., 292. (2) I. L. R. 13 Bom., 670.
(3) 14 M. L. R., 216. (4) 5 M. L. R., 219.

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an evidence of title or whether it creates new rights and obligations as distinguished from the confirmation of sale, is very important, and I have not sufficiently considered it in this case, as a certificate of sale has been granted and produced. If it is not the foundation of the purchaser's title but simply evidence of it, the order of the District Judge based upon it as being essential for the creation of the title, is evidently wrong.

In s. 316 of the Code of Civil Procedure there is an express direction that the certificate shall bear the date of the confirmation of the sale and accordingly we find in Form 150 appended to the Code that no date of confirmation is given, but the certificate bears only one date which, under s. 316, is the same as that on which the sale was confirmed.

There is nothing in the Code itself to show when the title to the property is vested in the purchaser and the qualified declaration in s. 316 is made only as against the parties to the suit and persons claiming through them. The starting period given in Article 138 of Schedule II of the Limitation Act (XV of 1877) would seem to indicate that, ordinarily, the title vests in the purchaser from the date of sale, as otherwise there is no reason why the period of limitation should be computed from the date of the sale. If that is the date when the right to sue accrues, surely such right cannot accrue before the title is vested in the purchaser. I am, for these reasons, of opinion that the District Judge was in error when he supposed that, at the time of the sale to the plaintiff, his vendor had no title vested in him to convey the property in suit.

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The lower courts did not decide the other issues, and I think the case must be remitted for decision on the merits.

RAMACHENDRA IYER, J.—I also think that the decrees of the lower courts ought to be reversed, and the case be sent back for a decision on the merits. The sale was confirmed long ago and there is no application before the court for confirmation of sale. According to the ruling of the Full Bench in *Soobba Row* v. *Gopalia*(1) an application for a certificate of sale may be made at any time; and the application for certificate made in 1890 was therefore not time barred.

Appeal allowed. Suit remanded for decision on merits.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 *February* 6.

GEEVOOBOYI (DEFENDANT No. 1) *v.* SRINIVASA RAO AND THULSABOYI (PLAINTIFF AND DEFENDANT No. 2).*

Res Judicata—Mortgage—Reversioner.

V died leaving a house to *J* for life with reversion to *T*, giving the latter also a right to maintenance and joint possession. The house at time of the testator's death was subject to a mortgage with possession. *J* sold the house to *R* who paid off the mortgage. *T* then obtained a decree establishing her right to occupy the house under the will. The court refused to go into the question of the validity of the sale or the right of *R* to a refund of purchase money should *T* obtain a decree. *R* then sued *T* for one-half of the mortgage money which he had paid.

Held, that the second suit was not barred as *res judicata*. That *J* succeeded to all the property of the testator and it was not

* Appeal from appellate decree No. 80 of 1892 against decree No. 301 of 1891 of Mr. C. Srinivasiengar, District Judge of Mysore, dated the 31st day of May 1892, reversing decree No. 55 of 1891 of Mr. S. Venkatavardaniengar, Munsiff of Mysore, dated the 30th day of September 1891.

(1) 8 M. L. R., 292.

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shown that the assets were insufficient to enable the mortgage to be redeemed. The reversionary heir, *T*, could not be called upon to pay or contribute towards the mortgage-debt.

This suit was brought to recover Rs. 120 claimed as contribution payable by defendant No. 1 towards a mortgage debt alleged to have been paid off by the plaintiff under the following circumstances.

One Venkuboyi deceased by will left her property including a house to defendant No. 2 for life, with remainder to defendant No. 1, giving the latter also a right to maintenance and to enjoy joint possession with defendant No. 2.

At the time of Venkuboyi's death the house was mortgaged to one Ramana with possession, the defendants occupying only a room in it. Defendant No. 2 sold the house to the plaintiff in order to redeem the mortgage and the greater part of the debt (Rs. 240) was paid off out of the purchase money by Ramana.

After this, defendant No. 1 instituted a suit against the plaintiff, defendant No. 2, and Ramana to have the sale set aside and to declare her right to possession. The will of Venkuboyi was produced and admitted by all parties. The mortgagee did not seriously contest the suit, as he had got back nearly the whole of his money and as the defendant No. 1 offered to pay him the small balance still outstanding. The plaintiff deposed that he was not prepared to contest the genuineness and validity of the will, but that the sale in his favor was a *boná fide* and real transaction duly supported by consideration. In other words, he stated that the bulk of the mortgage debt had been repaid by himself and

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not by defendant No. 2. An issue was framed as to the reality and validity of the sale. On being asked to settle an issue as to who had repaid the mortgagee's debt, the Munsiff held that no such issue was necessary, as that point could be dealt with upon the issue already framed. The plaintiff subsequently tendered a written statement in which he alleged that the will was false and invalid and that even should defendant No. 1 be found entitled to succeed, she should be compelled to repay him the mortgage debt which he had discharged. The Munsiff held that the written statement in so far as it questioned the genuineness and validity of the will was inconsistent with the oral statement which the plaintiff had already made, and could not consequently be accepted. He did not reject it altogether. But, for some reason not apparent on the record, he did not fix an issue as to the reimbursement claimed by the plaintiff. After the examination of a couple of witnesses the Munsiff stopped further proceedings and holding that the only issue framed in the suit was immaterial, passed a decree in favor of defendant No. 1. In delivering judgment, he observed that the determination of the question as to whether the mortgage had been paid off by the plaintiff out of his own funds was unnecessary and that it was opened to the plaintiff to file a separate suit for the recovery of his money. There was no appeal from that decision. In the present suit the plaintiff sought to recover from defendant No. 1 the half of the Rs. 240 paid by him towards redemption of the mortgage and to charge her share in the house with the amount,

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The Munsiff held that plaintiff had no right to claim reimbursement from defendant No. 1 as he only stepped into the mortgagee's shoes and purchased defendant No. 2's right to joint possession. He accordingly dismissed the suit.

On appeal the District Judge held the suit was not barred as *res judicata*, because not only was the question of the validity of the sale and payment of the purchase money not gone into in the former suit, but the court then declined to accept such a contention and referred the parties to a separate suit on the point, deciding the case simply on the rights of possession given by the will. As to the rights of the plaintiff, the District Judge however held that he was entitled to recover from defendant No. 1 the one-half which he claimed of the money paid to redeem the mortgage.

Defendant No. 1 appealed from this decision to the Chief Court.

Mr. *Narayana Rao* for the appellant.

Mr. *L. Srinivasiengar* for the respondent.

The Judgments of the Chief Court were as follows :—

THUMBOO CHETTY, C.J.—I agree with the findings of the District Judge, that the present claim is not *res judicata* and that it was the plaintiff who paid Rs. 240 to redeem the suit house from Ramana the mortgagee; but I am not disposed to hold with him that defendant No. 1 is liable to make good to the plaintiff the whole or any portion of the said amount. As remarked by the District Judge, under the will of the deceased Venkuboyi, the right of defendant No. 1 to succeed to the property left by the deceased

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would only arise on the death of defendant No. 2, and, during the lifetime of the latter, defendant No. 1 had only a right to be maintained. The right to maintenance included the right to be provided with lodging, and the decree in the former suit simply declares defendant No. 1's right to live with or enjoy possession of the suit house jointly with, defendant No. 2. Defendant No. 2 succeeded to all the property left by the deceased Venkuboyi, and she has not shown that the assets left by the deceased which came to her possession were insufficient to enable her to pay the mortgage money out of the same and to redeem the house. In the absence of such proof, I don't see how defendant No. 1, as reversionary heir, could be called upon to pay or contribute towards the mortgage debt.

The plaintiff evidently wanted to purchase the house from defendant No. 2 absolutely. It was an arrangement entered into between the plaintiff and defendant No. 2 without reference to defendant No. 1. Even assuming that the plaintiff purchased the house from defendant No. 2 absolutely, that purchase was subject to the right of defendant No. 1 to live in the house and to be maintained during the lifetime of defendant No 2. She cannot be called upon to pay, out of the assets of the deceased testatrix, to redeem the house from mortgage. In this view I would dismiss the plaintiff's suit with costs throughout.

KRISHNA MURTI, J.—I agree to the order proposed by the learned Chief Judge. It is a mistake to suppose that the plaintiff stepped into the shoes of the original mortgagee. What the plain-

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tiff bought was the right of defendant No. 2 in the house, which was devised to defendant No. 2 for her life and then to defendant No. 1. Till the death of defendant No. 2, the full title did not vest in defendant No. 1, and the house was subject to a mortgage. The plaintiff bought the house from defendant No. 2 alone, which, so far as defendant No 1 was concerned, was set aside. Acquiring the rights of defendant No. 2 alone, the plaintiff is said to have paid off the mortgage money due to the mortgagee and sues for contribution from defenddant No. 1 of one half of the amount of Rs. 240 which he alleged he paid to the mortgagee to redeem the house, and Rs. 16-6-5 interest. The only question which it is necessary to decide is, whether the plaintiff is entitle to sue for this contribution, and if so, how are the ratio and value of such contribution to be ascertained. It is convenient to consider the second part of this question first, as on the answer to it depends the decision of the first part. The law applicable to the case may be quoted, as follows, from p. 333 of Snell's Equity Jurisprudence, 9th edition:—

"When the beneficial interest in any property is settled—such settled property being portion of the testator's estate—if it is subject to any mortgage or incumbrance the rule is, that the tenant for life must, out of the rents and profits or income, keep down the interest on such mortgage or incumbrance and, subject thereto, the mortgage or incumbrance falls on the inheritance, *i.e.*, on the remainderman. As between the tenant for life and remainderman, the burden of it will be borne between them

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in proportion to the value of their respective interests."

The Munsiff refers to some of the circumstances which tend to indicate the value of such interests but he has not decided it. The parties have adduced no evidence to prove it and not unnaturally the Munsiff declined to undertake the task. The valuation of interest is a matter of calculation and not based upon any principle of law. If the defendants, who were both of them interested in the property, had agreed by a voluntary act to redeem the mortgage, they would have come to an agreement regarding their respective interests and their liabilities. If, on the other hand, the mortgagee had brought the property to sale by proceeding against both their interests, the remainder, if any, of the price realized after the payment of the mortgage, would have accrued to the benefit of both these legatees in accordance with the directions of the testator. But, without any such arrangement, the plaintiff rushes to buy up the property from one only of the beneficiaries, without actually ascertaining the exact value of the interest of the other beneficiary and, as remarked by the learned Chief Judge, it is by no means certain that this act entitles him to any compensation from defendant No. 1, before all the property of the testator is sufficiently accounted for. In the form the case has assumed, it is difficult to say who is in possession of such property and who is liable to account for it. There is nothing on the record to show what such property was, or that defendant No. 2 alone possessed it, and the question, in the present circumstances of the

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case, seems rather irrelevant. But the difficulty I feel is, that there is nothing on the record to enable me to find out the real value of defendant No. 1's interest. I cannot agree with the learned District Judge, when he holds "that the plaintiff is entitled to recover from defendant No. 1's interest in the house, such money as he may have paid towards the discharge of the mortgage." He would seem to entertain the opinion that the plaintiff could have sued for the whole, and there is no doubt that such opinion is erroneous. A confusion of ideas seems to be running through the whole course of his reasoning. He starts with the assumption that the plaintiff could be placed in the same position as that of the mortgagee, for which there is no warrant, as the plaintiff obtained no assignment of the mortgage but, after dealing with defendant No. 2 alone, acquired such rights as she possessed to redeem it. Starting with this assumption, he says that, "to the extent of defendant No. 1's interest in the house, the plaintiff's title was negative and he is therefore entitled to recover the money sued for from that interest." So far the District Judge has been dealing only with indeterminate quantities, and the only point which he had to find on evidence, *viz.*, the value of such interest, he has left undetermined. The fallacy of the reasoning, even according to the District Judge, is, that he deals with two interests and arbitrarily assumes the value of one. Granting that the plaintiff was entitled to recover the mortgage money which he paid, from the interests of both the defendants in the house, he is in possession of one, and there is no explanation as to why the other

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interest should be deemed equal to half the money advanced by the plaintiff, and that, also, in spite of the fact that defendant No. 1 had her liability to pay forty rupees to the original mortgagee separately decreed. The plaintiff does not make a deduction on this account and even if the interests are valued as being equal the calculation is faulty, as it does not take into account this liability to pay forty rupees. The plaintiff's right to contribution is after all an equitable claim and till the plaintiff establishes the fact that there was no other property out of which the mortgage money could have been paid, and to what pecuniary extent defendant No. 1 was benefited by his act, he does not seem to be entitled to enforce his claim in a court of justice.

I do not think the question of contribution could have reasonably arisen in the first case, and I am disposed to hold that it is not *res judicata.* The question went upon the construction of the will, under which the present plaintiff, then defendant, denied that the then plaintiff (present defendant No. 1) had any right to the house which he had purchased from the present defendant No. 2. From his pleadings, it is obvious that the house was not in his possession and it was for joint possession that the present defendant No. 1 sued in that suit. Her joint legatee and the present plaintiff, who claimed to have bought it from that legatee, were made parties, as they had also some interest in the property.

For these reasons the decree of the District Judge must be reversed and that of the Munsiff dismissing the suit with costs be restored.

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The appellant will recover her costs from the respondents.

Appeal allowed. Suit dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893 *February* 6.

VENKATA KRISHNIA (Plaintiff) *v.* SUBARAYA (Defendant No. 1).*

Revenue sale—Suit by purchaser for possession—Mysore Land Revenue Code, ss. 187 and 221 (c).

The purchaser at a revenue-sale confirmed by Government under certain conditions sued for possession of certain lands to which he alleged a right under the terms of the confirmation. *Held,* that if the plaintiff were entitled to possession of the lands sued for, he must obtain it through the Deputy Commissioner under s. 187 of the Mysore Land Revenue Code and that a civil suit for the purpose is barred by s. 221 (c) of the same Code, the words of which embrace a claim by a purchaser to be put into possession of land purchased by him at a revenue-sale. *Malle Gowda v. Cheluviah*(1) distinguished.

Mr. *Narayana Rao* for the appellant.

Messrs. *Nunjappa* and *Rangaiengar* for the respondent.

The Judgments of the Chief Court were as follows :—

Thumboo Chetty, C.J.—The plaintiff, as purchaser at a revenue sale of five *vritties* of G. Kapaya, on account of arrears of *jodi* due to Government, sued to recover certain lands which originally belonged to the said *vritties,* in the possession of defendant No. 1, with three years' produce.

* Appeal from appellate decree No. 32 of 1892, against decree No. 64 of 1891 of Mr. M. Ramaswamier, Subordinate Judge of Mysore, dated the 21st day of December 1891, reversing decree No. 101 of 1890 of Mr. B. Srinivasa Rao, Munsiff of Holé Narsipur, dated the 28th day of December 1890.

(1) 15 M. L. R., 129.

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The defence was, that Kapaya ceased to enjoy the lands more than twelve years ago; that before the sale was confirmed by the Government, defendant No. 1 petitioned the Government representing that, at the time of sale, the suit-lands did not belong to the said five *vritties* and that defendant No. 1 was in possession in his own right; that the Government confirmed the sale subject to the arrangements originally made by the *vrittidars;* and that the plaintiff as purchaser was not entitled to oust the defendant, much less to recover any mesne profits.

The Munsiff gave judgment for the plaintiff, but the Sub-judge on appeal dismissed the plaintiff's suit. Hence this appeal by the plaintiff.

It is found by both the courts below, that the suit-lands were alienated by Kapaya's sons so far back as 1876 and that defendant No. 1 and his predecessors in title were in adverse possession for more than twelve years as against the original *vrittidars* and the plaintiff's brother Malkarjunia, for whose default the five *vritties* in question were sold by Government on the 7th March 1887. These very lands were attached by Malkarjunia in 1877 through the court of the Judicial Assistant of Hassan as belonging to the said five *vritties*, but, on the complaint of one Bandya, defendant No. 1's predecessor in title, the attachment was removed. It is thus evident that the plaintiff's brother, the defaulter and the owner of the said five *vritties*, had no possession or enjoyment of the said lands since 1877. When the revenue sale took place in March 1887 and before the sale was confirmed by the Dewan, defendant No. 1 objected to the sale on the ground that the suit-lands,

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which were alienated by the original *vrittidars*, should be excluded from the sale and that the existing arrangements as to enjoyment should be upheld. It was upon consideration of the representations made by defendant No. 1 and the report thereon made by the Deputy Commissioner that the Dewan's Order No. 4962—70/C 124, dated the 1st December 1887, was passed, confirming the sale with an express declaration, that existing private arrangements among the *vrittidars*, as regards the mode of enjoyment, will not be disturbed. Para 2 of the said order clearly shows that, but for the above declaration, the ordinary rule, that "a revenue sale is free from all tenures, encumbrances and rights created by the jodidar or any of his predecessors in title or in any wise subsisting against him," would have been applicable to this case. The Government, in their wisdom and as an act of grace, thought fit to comply with defendant No. 1's request and to confirm the sale subject to existing rights of the *vrittidars* as between themselves, of whom defendant No. 1 was one. There was nothing to prevent Government imposing any conditions specially before confirming a revenue sale. The purchaser (the plaintiff) was also one of the *vrittidars*. He acquiesced in the order of Government. He cannot, therefore, seek to oust defendant No. 1 from the lands which were in his possession for more than twelve years and which he held on the date of the revenue sale in his own right. In this view the decree of the lower appellate court seems correct and must be upheld, and this second appeal be dismissed with costs.

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THUMBOO CHETTY, C. J.—The above is the judgment which I wrote after the appeal was first argued before a Division Bench; but as my colleague, RAMACHENDRA IYER, J., was not quite prepared to agree in the view I have taken of the case, the appeal was posted for rehearing before a Full Bench. After hearing again the arguments of Mr. *Narayana Rao* for appellant, I am not prepared to dissent from the view taken by the lower appellate court. The Dewan's Proceedings, as well as the subsequent endorsement* granted to defendant No. 1, show clearly that the sale was confirmed, *subject to the arrangements originally made by the vrittidars*, under which the defaulter, on whose account the sale took place, was, on the date of sale, out of possession, and the purchaser, therefore, simply purchased the right, title and interest of the defaulter whatever they were. The present claim for possession is, therefore, inadmissible and the plaintiff's suit has been rightly dismissed.

During the argument before the Full Bench, it was admitted by Mr. *Narayana Rao* that, subsequent to the confirmation of the revenue sale, the plaintiff as purchaser, did not apply for and obtain possession of the *vritties* through the Deputy Commissioner.

Section 187 of the Mysore Land Revenue Code provides that, after a revenue sale has been confirmed, the Deputy Commissioner shall put the person declared to be the purchaser into possession of the lands sold. If the defaulter, whose land has been sold, refuses to give up possession, the Deputy

* *Vide* p. 54 of the printed Record.

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Commissioner may, under s. 209, evict the defaulter and deliver possession to the person entitled. There is no explanation why the plaintiff has brought this civil suit for possession when he might and ought to have applied to the Deputy Commissioner to put him in possession after the sale was confirmed by the Dewan. Till he actually obtains possession of the lands, he has no right to claim the produce. It is a matter for consideration, whether a claim to recover possession of land sold for realization of revenue due to Government is not a claim connected with proceedings for the realization of the land-revenue, falling under cl. (*c*) s. 221, Mysore Land Revenue Code. If so, the present suit, so far as it relates to the plaintiff's prayer to obtain possession of the suit-lands, is not within the jurisdiction of the civil court.

On the whole it seems to me that, under the restricted conditions on which the revenue sale has been confirmed by Government, the plaintiff is not entitled to possession of the suit-lands, and that, even if he is entitled to possession, he must obtain it through the Deputy Commissioner, under s. 187 of the Mysore Land Revenue Code, and that a civil suit for the purpose is barred by the provisions of s. 221, (*c*) of the same Code.

RAMACHENDRA IYER, J.—This is a suit for possession of lands purchased at a revenue sale. The Munsiff made a decree in the plaintiff's favor, which was reversed on appeal by the Subordinate Judge of Mysore. The plaintiff has made a second appeal from the Sub-judge's decree.

The *jodi* of Hariharpur consists of Hariharpur and

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six other villages and is divided into forty-four *vritties*. The *vrittidars* arranged among themselves that Hariharpur should be enjoyed by them as an inam village, that another village should be set apart for the maintenance of a temple and that the remaining five villages should be charged with the payment of *jodi* due to Government. The *jodi* having fallen into arrear, the *vritti* lands in suit and other *vritties* were sold by the Deputy Commissioner.

The plaintiff's contention is, that what was sold by the Deputy Commissioner was the land of the defaulter situated in all the seven villages. The defendant's contention is, that Hariharpur and the village set apart for the temple were excluded from the sale, and he has relied upon the order passed by the Government, when it confirmed the sale. The order is as follows:—"The sale is confirmed and the Deputy Commissioner will be requested to place the purchasers in possession of the *vritties* by means of written notices to all *vrittidars*. The sale is subject to any legally existing private arrangement among the *vrittidars* as regards the mode of enjoyment of the entire *jodi* village. This declaration must be embodied in the notices to be issued as above to the *vrittidars* as well as in the sale certificates to be issued to the purchasers. It is necessary to make this declaration in express terms as a necessary result of the act of grace under which specified individual *vritties* and not the entire *jodi* village have been sold * * * * and the purchasers of the specified *vritties* must be declared to take the position of the former holders of these *vritties* towards the whole body of *vrittidars*, and as

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regards its mode of enjoyment of the entire *jodi* village."

The order of the Government sanctions the sale of specified recognised *vritties* and makes an exception to the general rule. The *jodi* is a charge upon the entire village and, when a portion of the *jodi* is in arrears, it is open to the Government to bring the village to sale. As a matter of grace, the Government chooses to sell the *vritties*, whose owners have not paid the *jodi*, and puts the purchaser in possession of all the rights and privileges of the defaulter. The purchaser stands in the shoes of the defaulter and he is compelled to abide by the arrangements made by the body of the *vrittidars* in regard to the enjoyment of land by *vritties*. I do not see anything in the Dewan's proceedings to show that the sale of five villages alone was confirmed. I am of opinion that the purchaser is entitled to the possession of all the lands which were allotted to the defaulter on account of his *vritti*, and that the effect of the Dewan's order is to debar him from compelling the *vrittidars* to make a fresh distribution. Upon the merits, the Munsiff's decree is right and the Subordinate Judge's decree ought to be reversed.

A question was raised by us at the hearing of the appeal, whether civil courts have power to take cognizance of such suits. Having taken time to consider the question, I have arrived at the conclusion that the plaintiff ought not to have filed this suit. Section 221 of the Land Revenue Code prohibits a civil court from taking cognizance of "any claims connected with or arising out of any proceedings for the realization of Land Revenue."

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These words seem to embrace a claim by a purchaser to be put into possession of land purchased by him at a revenue sale. If the law made no provision at all to enable a Deputy Commissioner to give possession to a purchaser, it may perhaps be open to argument, whether the section may not refer to claims other than claims to possession. Under the rules which were in force when the sale was made, the form of sale-notice of land contained the following provision :—"Purchasers who have completed the payment of the purchase money will, as soon as the sale has been confirmed by the Deputy Commissioner, *be placed in immediate possession*, and the lands will be registered in the name of the purchaser &c." *See* Sale-notice para. 8 on page 19, Revenue Manual. The order of the Dewan, which directed the Deputy Commissioner to put the purchasers in possession was in conformity with the rules then in force. All matters which related to sales for Government Revenue were treated as Miscellaneous Revenue proceedings (p. 229 of the Revenue Manual). These rules have been embodied in the Land Revenue Code, s. 187, and all matters relating to or arising from sales for Government Revenue are made cognizable by Revenue Courts alone. I am of opinion that the plaintiff ought to apply to the Deputy Commissioner of the District for possession and that civil courts have no jurisdiction to entertain the suit and that each party ought to bear his own costs throughout.

KRISHNA MURTI, J.—I have not much to add to what my learned colleagues have said. I am clearly of opinion that the civil courts have no jurisdiction to entertain this suit.

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The learned advocate for the appellant referred to decisions of this court in which I took part. In one of them, *viz.*, *Mallegowda* v. *Cheluviah*(1), I have expressed the same opinion very distinctly and proceeded upon the ground that the purchaser was put in possession of the land sold by the revenue authorities and that he was entitled to eject all others from it. The relief claimed there was not to reduce the right bought at a revenue sale into possession, but to eject wrongful trespassers after the purchaser had been put in possession. That case is clearly distinguishable from the present one.

In the other suits, *Hanumantharayappa* v. *Adeppah*(2) and *Hanumantharayappa* v. *Rama and another*(3), the purchaser was opposed by a suit to set aside the sale, on the ground of fraud. There also, the purchaser had been put in possession by the revenue authorities and, as it was within the jurisdiction of civil courts to enquire into the validity of a sale when it was assailed on the ground of fraud, the question of legality or otherwise of the purchaser's possession came necessarily for investigation before the civil court. The allegation of fraud was held not proved, and the purchaser directed to be confirmed in his possession. There is no such special circumstance alleged in this case to open the door of the civil courts, and the plaintiff's suit must be thrown out.

As the objection to the jurisdiction was taken by ourselves, I would direct that each party bear his own costs throughout.

Suit dismissed without costs.

(1) 15 M. L. R., 129.

(2) Appeal No. 81 of 1892, not reported.

(3) Appeal No. 154 of 1892, not reported.

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Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

HUCHA AND OTHERS (PLAINTIFFS) *v.* THIRUMALA GOWDA AND OTHERS (DEFENDANTS).* 1893 *February* 13.

Hindu law—Reunion—Rights of reunited sons—Rights of divided son.

A Hindu died, leaving sons by two wives *D* and *K*. He had divided from them all, but the sons of *K* claimed that there had been subsequently a reunion with them and therefore on his death they were entitled to his estate to the exclusion of the other sons.

Held, per RAMACHENDRA IYER, J., following the Saraswati Vilasa, that reunited sons are entitled to share in their father's estate. "The proprietorship of reunited and unreunited sons in their father's wealth is properly equal." As a fact a reunion was proved.

Held, per KRISHNA MURTI, J., on the evidence, that no reunion was proved.

Held PER CURIAM—That all the sons of the deceased should share his property equally.

The facts and contention of the parties appear sufficiently from the judgments of the Chief Court.

Mr. *Ramasawmy Chetty* for the appellants.

Mr. *Ramaswamy Iyer* for respondent No. 1.

The Judgments of the Chief Court were as follows:—

RAMACHENDRA IYER, J.—One Thimma Setty married two women Davirama and Kempama, and he had sons by both of them. About thirty years ago, there was a division between him and Davirama's sons and, about ten years ago, there was another division between him and Kempama's sons, *viz.*, plaintiff No. 1, the father of plaintiffs Nos. 2—6 and defendant No. 1. He died in 1890. Plaintiff No. 1 and the father of plaintiffs Nos. 2—6 alleged that the property left by the deceased belonged to

*Appeal from appellate decree No. 35 of 1893, against decree Nos. 59 and 80 of 1891 of Mr. M. Ramaswamier, Subordinate Judge of Mysore, dated the 30th day of October 1891, reversing decree No. 874 of 1890 of Mr. C. B. Seshagiri Rao, Munsiff of Seringapatam, dated the 12th day of February 1891.

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them and their brother (defendant No. 1) and that they were entitled to two-thirds thereof. The suit was brought for division and for possession of their shares.

The defendant urged among other pleas, that he and his father were reunited and that he alone was entitled to the property.

The Munsiff of Seringapatam was of opinion that there was no reunion, and secondly, that, even if there was a reunion, all sons were equally entitled to the father's property. He found that the father left behind him three sons by Kempama and one son (defendant No. 4) by Davirama and that the plaintiffs were entitled to two out of four shares.

The Subordinate Judge of Mysore found that the evidence established the reunion alleged by the defendant, and that the reunited son had a better right than the other sons who were separate from their father. He reversed the Munsiff's decree and dismissed the suit.

The plaintiffs have appealed from the Subordinate Judge's decree.

The Subordinate Judge's finding that there was a reunion, does not seem to be wrong. There is a reunion if a father and son who were divided, live together and agree to unite their wealth and to treat it as joint property. If the parties were members of a trading family, the use they made of their wealth would clearly show what was the understanding between them. As they were agriculturists, it is difficult, to find positively that there was or was not an agreement to reunite. It may be that the old man chose to reside with one of his sons, because

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he found it a convenient arrangement; but on the other hand, if he wished to reunite, I do not see what more he could have done than what he did. He lived with his son, left all the property to his management, apparently kept no separate account of his receipts and disbursements and showed by his conduct that he wished to exclude his other sons from inheriting his property. That being so, I am not prepared to hold that the Subordinate Judge was wrong in concluding that there was a reunion.

A father and son may reunite, and I do not think that it makes any difference whether it is the son who dwells in the father's house, or whether the father chooses to dwell with his son.

The question of law involved in the suit is, if a man was reunited with one of his sons and dies, leaving behind him the reunited son and divided sons, whether the reunited son alone inherits the property or whether all the sons are entitled to it. The Mitakshara discusses the rights of brothers and leaves the question of succession of sons unnoticed. However, the first verse of s. ix of Ch. II seems to imply that sons have equal rights to their father's property. "The author next propounds an exception to the maxim that the wife and certain other heirs succeed to the estate of one who *dies leaving no male issue*. A reunited brother shall keep the share of his reunited co-heir who is deceased, or shall deliver it to a son subsequently born." As a wife or a daughter is declared an heir when there are no sons or grandsons or great-grandsons and as the chapter on Re-union begins with the statement

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that the order of succession in a reunited family is an exception to the law which recognizes the right of a wife or a daughter to succeed; it seemed to me that in the opinion of the author of the Mitakshara re-union in no way affects the rights of sons. If a man reunites with a son, or brother, or nephew, his wife, daughter and other heirs run a risk of their right being defeated, but not his sons.

Madavyan and Varadarajan do not throw more light on the question and they may be dismissed without any notice.

The law is thus stated in Smrithi Chandrika, "If, before a second partition takes place, among the reunited parceners, one of them dies *leaving sons and the like*, the second partition is to take place according to the principle contained in the text, among those whose fathers are deceased, the allotment of shares is according to the fathers," there being no other law on the subject. Where, however, the deceased reunited parcener *leaves no son and the like*, the rule contained in the passage, "the wife and the daughters, &c.," does not apply, there being a different law on the subject. (Chapter XII s. 7). The order of succession accordingly stands thus:—In default of the brother, the father inherits; in default of him, the mother; and in default of her, the widow. To avoid the supposition that this order of successions is opposed to that prescribed, in the case of the wealth of a divided member dying sonless, by the passage, "the wife and the daughters, &c.," the author says that the order of succession is applicable to the wealth of a reunited parcener dying sonless (Chapter XII s. 32). These extracts seem to

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be an amplification of the rule which is laid down in the Mitakshara. As the superior right of a re-united son is not expressly affirmed and as it is explicitly stated that, when a man dies leaving no sons, an exception is made in favor of a reunited member and the widow's right is postponed, it seems to me that the Smrithi Chandrika, following the Mitakshara, recognizes the equal rights of all sons.

The author of the Vira Mitrodaya discusses the question and arrives at the conclusion that a reunited son can claim no preferential right. If it be argued that as by reason of the text, a reunited brother and the like succeed to the estate of a reunited person, in spite of the wife and the like, so by virtue of the same text, the reunited sons alone should inherit the estate of the father when there are both reunited and unassociated sons. The answer is that the argument is not tenable; since the term "sonless" occurring in the previous text is to be construed with this text; hence the death of a reunited person *without male issue* is the cause of succession of a reunited co-heir * * * * . Besides ownership in the property of the father or other ancestor is to be held to be caused by sonship alone, if not attended with degradation and the like disqualification, but not also if attended with reunion; and as the sonship belongs equally to all the male issue, whether reunited or not, therefore the succession to the property of all the sons and the like without distinction is proper." (Gopal Chandra Sastry's translation, pp. 217 and 218.)

The Saraswati Vilasa emphatically declares

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that there is no text which gives the father's property to a reunited son and comes to the conclusion that "the proprietorship of reunited and unreunited sons in their father's wealth is properly equal." (Foulke's translation, verse 763.)

The Vivada Chintamony and the Vyavahara Mayuka take a different view. But they ought not to be followed by us, because the Smrithis which are respected in this part of India are the Mitakshara, the Smrithi Chandrika and Madavyan and Digests like Vira Mitrodaya which support the Mitakshara. We may follow a rule of law contained in Vyavahara Mayuka if the Mitakshara or Madavyan contains no rule on that point. But I do not think that it is usual to regard it as of paramount authority in this part of the country and to follow it when it contradicts the Mitakshara. As no exception is made by the Mitakshara the Smrithi Chandrika and the Madavyan, in favor of the reunited son as against other sons, as those treatises seem to favour the equal rights of sons, and as two champions of the doctrines of the Mitakshara, *viz.*, the authors of Vira Mitrodaya and Saraswati Vilasa hold that no exception ought to be made, I think the Hindu Law supports the plaintiffs' contention. If the plaintiffs can claim the deceased's property, there is no reason for disallowing the claim of defendant No. 4, who also is son of the deceased, though by another wife. I think that the property ought to be divided into four shares, and that the plaintiffs ought to get possession of two shares.

The courts below have concurrently found that

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the property which belonged to the deceased are items 1, 2 and 11 of the plaint schedule. The plaintiffs will get half of this together with mesne profits from the date of the suit till the date of delivery of possession. The amount will be ascertained in execution. Each party having partially succeeded, will bear his own costs throughout.

KRISHNA MURTI, J.—After giving the case the consideration which its importance demanded, I have come to the conclusion that, on the question of fact as to whether there was reunion or not, I must agree with the finding of the Munsiff in the negative. With the exception of the fact, that the deceased father, after effecting the partition between himself and his sons, lived with defendant No. 1, there is nothing whatever to indicate that the father united with his son in such a way as to lead to an inference of a change of status or fusion of their interests. It seems to me that the Subordinate Judge has founded his conclusion upon very loose reasoning indeed. The father might have cherished a wish and intended that what he did possessed of might go to this son alone. But this wish does not show that he changed his divided status into that of a joint one. On the other his attempt to transfer the patta and his being frustrated in that attempt show not a joint transaction but an individual act of his own to transfer the land to his son. He was himself not sure that the law would operate as he wished regarding the devolution of his property after his death, and he had to resort to the apparently fraudulent and clumsy expedient of having the land sold for the arrears of

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revenue and its being bought up by a stranger, who, in his turn, sold it to defendant No. 1. This transaction shows at all events that the parties believed that it had the effect of divesting the father of all the property in the land and vesting it in the son. That such a transaction should be viewed as manifesting the creation of a joint interest or the exercise of a joint right is what I cannot understand. It is only these three circumstances, *viz.*, the father living with this son; his evident wish that this son alone should inherit all his property; and his attempt to transfer the patta in his name, which the Subordinate Judge considered as sufficient to prove reunion. All these acts and wishes are of the father alone and manifestly ought not to suffice to create a status which to be joint must also be accepted or acquiesced in by the other member, *viz.*, defendant No. 1. As a dutiful son, he might have fed his father, cultivated his lands and attended to his other wishes. But a single act of his has not been proved to show that he allowed his own share of the property to be dealt with in any manner by his father. For these reasons I conclude that there was no such reunion as is contemplated by law.

The discussion of the legal aspect of the question becomes unnecessary.

In para 8 of his judgment, the Subordinate Judge states that the deceased father of the parties had four sons by his first wife, but accounts only for three by saying that one died leaving no representatives, another was adopted and the third is defendant No. 4. But he has said nothing about Thirumala, and it is not clear how his inheritance was

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dealt with. He is however no party to this case, and at this stage I propose to do nothing more than to mention what appeared to me was an omission.

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I agree to the decree proposed by my learned colleague, which is in accordance with that of the Munsiff.

Appeal allowed. Decree modified. No costs.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and C. Meenacshaya, Judges.

JANAKAMA (PLAINTIFF) *v.* SOOBAMA AND ANOTHER (DEFENDANTS).*

1893 March 17.

Hindu Law—Inheritance—Sister—Sister's son.

According to Hindu law, assuming that a sister is entitled to inherit as a *bandhu*, the claims of a sister's son are superior.

Mr. *J. C. S. Lawrance* for the appellant.

Mr. *B. Srinivasiengar* for the respondent.

The following judgments of the Chief Court were delivered :—

THUMBOO CHETTY, C.J.—The plaintiff and defendant No. 1 are the daughters of one Raghupathia. Defendant No. 2 is the son of defendant No. 1. Raghupathia died in 1869-70. His son Ananthramia, a minor, succeeded to his father's estate. The minor died shortly after his father's death. His mother, Anantha Lutchmama, succeeded to her son's estate. She died six months prior to the institution of this suit. Tho plaintiff claims a moiety of the property as the heir of her deceased brother.

* Appeal from appellate decree No. 78 of 1892 against decree No. 262 of 1891 of Mr. C. Sreenivasa Iyengar, District Judge of Mysore, dated the 16th day of May 1892, reversing decree No. 48 of 1891 of Mr. S. Venkatavardaniengar, Munsiff of Mysore, dated 31st day of August 1891.

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The Munsiff gave judgment for the plaintiff. The District Judge dismissed the suit, on the ground that the plaintiff's claim must be postponed to that of defendant No. 2, who is the son of another sister of the said minor. The plaintiff has preferred this second appeal.

If the question in this case was merely as to the right of the plaintiff to succeed to her brother's property in preference to strangers in blood, I should have held, following the decision of the Madras High Court in *Kutti Ammal* v. *Radakrishna Aiyan*(1) that, as a *bhinnagotra sapinda*, a sister falls within the definition of *bandhu*, and, as such, she was entitled to succeed to her brother's property. Although she may have lost her status as a *sagotra sapinda*, having passed into a strange *gotra* immediately upon her marriage, yet she has not lost her status as a *bhinnagotra sapinda*. But she can only assert this right to come in after brothers in the absence of preferable *male* heirs. The claim of a sister's son as *bandhu* is superior to that of a sister, as has been clearly shown by the two decisions of the Madras High Court in *Chelikani Tirupati Rayaningaru* v. *Rajah Suraneni Vencata Gopala Narasimha Rau Bahadur*(2) and *Lakshmanammal* v. *Tiruvengada Mudali*(3). Following these decisions, I would affirm the decree of the District Judge and dismiss this second appeal with costs.

MEENACSHAYA, Offg. J.—Following the decision of the Madras High Court in *Lakshmanammal* v. *Tiruvengada Mudali*(3), I would uphold the decision of

(1) 8 M. H. C., 88. (2) 6 M. H. C., 278.
(3) I. L. R., 5 Mad., 241.

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the District Judge and dismiss this second appeal with costs.

RAMACHENDRA IYER, J.—The plaintiff claims the property in suit as a sister of the last owner, and the claim is resisted by a sister's son. The points for determination are, whether a man's sister is in the line of his heirs, and if she is, whether her right is superior to that of a nephew.

It is conceded that a sister can rest her claim, not on the ground that she is a *gotraja sapinda*, but on the ground of being a *bandhu*. The law as to the succession of *bandhus* and the order of their succession is very obscure, and it has been differently understood by different commentators. That being so, it would have been satisfactory to me if the advocates had accepted my suggestion, and pressed for an enquiry as to the existence of a customary rule of law. In the absence of evidence as to usage, I am not prepared to dissent from the opinion which has been expressed by the District Judge.

It is a moot point whether Hindu women are not disqualified to inherit property, and whether any woman can claim as an heir if her right is not expressly sanctioned by the law. On the other hand, a nephew claims his uncle's property, not through his mother, but in his own right. His claim to succeed as a *bandhu* is undoubted and has been long recognized. Without expressing an opinion on the right of a sister, I may say that I see no authority for preferring her, assuming that she is an heir, to a *bandhu* like a nephew. The authorities have been fully considered in *Lakshmanammal* v. *Tiruvengada Mudali*(1) and I have nothing to add to the

(1) I. L. R. 5 Mad., 241.

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reasons stated in it. The principle laid down in that case was adopted in another case, *Krishnayya v. Pichamma*(1) in which, Justice Muthusamy Iyer upheld the right of a man's daughter's son's son as a *bandhu* in preference to that of a daughter's daughter. I agree in dismissing the appeal.

Appeal dismissed.

Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1893 July 19.

BASALINGAPA (PLAINTIFF) v. GURUSANTHAPA AND OTHERS (DEFENDANTS).*

Hindu Law—Undivided family—Powers of manager—Limitation Act (XV of 1877) ss. 19 and 20—Acknowledgment of liability —Contract Act (IX of 1872) s. 25 (3)—Revival of debt.

The managing member of an undivided Hindu family cannot revive a barred debt against other members of the family by a fresh promise such as is referred to in s. 25 (3) of the Contract Act (IX of 1872), but he has power to make payments for the family and the same authority to acknowledge as he has to create debts. If, therefore, he makes payment towards an unbarred debt under s. 20 of the Limitation Act (XV of 1877), the members of the family are bound; and also, *semble*, if he acknowledges a debt under s. 19 of the same Act.

Mr. *S. Narayana Row* for the appellant.

Mr. *S. Nunjundappa* for respondent No. 1.

Mr. *S. Ramaswamiengar* for respondents Nos. 2, 3 & 4.

The Judgment of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) was as follows:—

* Appeal from appellate decree No. 126 of 1892, against decree No. 58 of 1892 of Mr. B. Tirumalachar, District Judge of Nagar, dated the 28th day of November 1892, modifying decree No. 82 of 1891 of Mr. Booden Sheriff Sahib, Munsiff of Honnalli, dated the 14th day of March 1892.

(1) I. L. R. 11 Mad., 287.

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This was a suit for the recovery of principal and balance of interest due on a deed of hypothecation executed by Chickaveerapa, father of defendants, and by defendant No. 1, on the 2nd May 1872.

Chickaveerapa died fourteen years ago without making any payments towards the bond. According to the terms of the bond, the amount secured thereby was made payable on the 30th April 1875. This suit was filed on the 2nd March 1891. Plaintiff alleged that defendant No. 1 made certain part-payments and that a new period of limitation had to be reckoned from the dates of such payments endorsed on bond by defendant No. 1, namely, 5th April 1878; 23rd April 1883; 22nd June 1885; and 7th March 1888.

Defendant No. 1 admitted only the payments alleged to have been made in April 1883 and June 1885 and denied the first and fourth payments.

The other defendants pleaded that the act of defendant No. 1 in making the payments and acknowledging the debts was not binding on them and that the suit was barred as against them.

The court of first instance (Munsiff of Honnalli) held that all the part payments referred to in the plaint were made by defendant No. 1 as manager of the family, that he was personally liable for the claim as were also the properties hypothecated, that defendants Nos. 2 to 4 were not answerable for the claim personally, but that their shares in the hypothecated property were liable, as the debt was contracted for family purposes binding on them.

The District Judge, on appeal, held that the endorsements, relating to the alleged first and fourth

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payments, marked *B* and *E*, were not genuine, that defendant No. 1 had no authority to revive the debt as against his brothers (defendants Nos. 2 to 4) by making the two admitted endorsements, marked *C* and *D*, dated 23rd April 1883 and 22nd June 1885, that the personal liability of all the defendants was barred and that, the suit as against defendants Nos. 2 to 4 being completely barred, their shares in the hypothecated property must be absolved and that the plaintiff was entitled to enforce his claim only against defendant No. 1's share of the hypothecated property. There was a decree accordingly and the plaintiff and defendant No. 1 were ordered to bear their own costs and the plaintiff was further directed to pay the costs of the defendants Nos. 2 to 4. It is against this decree that the present second appeal has been preferred by the plaintiff.

It was chiefly argued—

1st. That the first and fourth endorsements, marked *B* and *E*, were genuine.

2ndly. That, as defendant No. 1 made the four part-payments and the endorsements, marked *B* to *E*, as the managing member of the defendant's family, his acknowledgment of the debt was binding on defendants Nos. 2 to 4 and that the plaintiff's claim as against all the defendants personally and against the whole hypothecated property was *not* barred.

With regard to the endorsements *B* and *E*, we agree with the District Judge.

Excluding from consideration the endorsements *B* and *E*, we have to consider whether the remaining two endorsements *C* and *D*, which are admitted

by defendant No. 1, are binding on defendants Nos. 2, 3 and 4, and whether they entitle the plaintiff to proceed against all, or any of the defendants personally, and against the whole of the hypothecated property. The personal liability was barred after the expiration of six years from the date of the bond, and as the payments evidenced by *C* and *D* were made long after the expiration of the said period, the plaintiff has lost the personal remedy. The date of *C* was within twelve years from the date of the bond and the payment evidenced by *D* was made within three years from the date of *C*; so that the right to proceed against the hypothecated property has been kept alive, and there can be no doubt of the plaintiff's right to bring the defendant No. 1's share to sale.

The next question for determination is, whether the acknowledgments of the debt made by defendant No. 1 were sufficient to keep the debt alive against the other defendants. The Munsiff found that, after their father's death, the defendant No. 1 became manager of the family and that all the brothers lived in union up till three years ago. He was of opinion that the acknowledgments which were made by the manager were sufficient to keep the claim alive against the family. The District Judge did not find that defendant No. 1 was not the manager. He was of opinion that the defendant was probably the manager of the family; but that this fact would not necessarily constitute him a duly authorized agent on their behalf to revive a debt, which but for such payment would be barred by limitation and he quoted as his authority the

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judgment in *Chinnaya Nayudu* v. *Gurunatham Chetti*(1). That was a judgment delivered by a Full Bench of the Madras High Court. The learned Judges were of opinion that "a manager has authority to make payments for the family; *he has the same authority to acknowledge as he has to create debts;* but he has no power to revive a claim barred by limitation unless he is expressly authorized to do so." If a claim is barred and if a manager make a fresh promise in consideration of the barred debt, that is not *primâ facie* binding upon the family. When, however, a debt is not barred, and a manager pays interest or principal, and thereby acknowledges the liability, no express authorization by the junior members of the family is needed, inasmuch as it is an incident of his right of management to borrow money and to repay debts on behalf of the family. In this case, as the claim was not barred on the date of either of the payments evidenced by the endorsements *C* or *D*, the judgment quoted by the District Judge is not an authority against the plaintiff, but one which very strongly supported his contention. We have expressed our concurrence in this judgment in *D. Appu Row* v. *Venkanna Char*(2). Following the decision of the Madras High Court, we hold that the plaintiff has not lost his remedy to bring to sale the whole of the hypothecated property. We modify the District Judge's decree and direct that, if the principal sum, together with interest thereon up to the time of payment, be not paid by the defendants within six months from this date, the plaintiff be entitled to bring the hypothecated property to sale.

(1) I. L. R. 5 Mad., 169. (2) 14 M. L. R. 107.

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As, upon the facts, it has been found that the plaintiff did not establish the genuineness of the endorsements, *B* and *E*, and as it has been found that the defendants set up a false case of division, we direct each party to bear his costs throughout.

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Appeal allowed without costs.

Before A. Ramachendra Iyer, Officiating Chief Judge and P. N. Krishna Murti, Judge.

MUDIYA (PLAINTIFF) *v.* THOPA (DEFENDANT).*

1893 Sept. 22.

Suit for produce of land—Jurisdiction of Small Cause Court—Valuation of suit.

A suit for produce of land claimed by the plaintiff and involving a *bonâ fide* dispute as to title, should rightly be tried as a regular suit for possession and damages. But such a suit should not have a court-fee as if it was one for declaration of title. If the plaintiff be out of possession, the suit ought to be valued as one for possession and mesne profits.

Mr. *S. Narayana Rao* for the appellant.

Mr. *Nunjundappa* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA IYER, Offg. C. J. and KRISHNA MURTI, J.) was as follows:—

The suit was originally filed in a Small Cause Court for the produce of the plaintiff's land. The judge was of opinion that it involved a *bonâ fide* dispute as to the title of the land, and that the suit must be tried as a regular suit for possession and for damages. So far, the judge was right. But he was not right in compelling the plaintiff to pay stamp, as

*Appeal from appellate decree No. 33 of 1893, against decree No. 286 of 1892 of Mr. C. Cress, District Judge of Mysore, dated the 23rd day of November 1892, reversing decree No. 31 of 1892 of Mr. T. J. Vanderlowen, Munsiff of Hassan, dated the 30th day of July 1892.

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if his suit was for a declaration of title. If the plaintiff was out of possession, the suit ought to have been valued as one for possession and mesne profits.

Upon the merits, we agree with the District Judge. The defendant wished to have the disputes set at rest, and he applied to the Amildar to split the survey number. When the sheikdar proceeded to divide into equal shares, he abstained from putting his signature to the document. He did not say in his application that the shares were unequal, and if they were equal, there was no reason for raising an objection at the last moment. The Munsiff did not rightly construe *B* and *C*. *Exhibit A* appears to have been executed after disputes arose, and it does not appear to be a *bonâ fide* document, as it purports to have been executed by defendant No. 1. The oral evidence was not of any value.

We confirm the District Judge's decree, and dismiss the second appeal with costs.

Before A. Ramachendra Iyer, Offg. Chief Judge and C. Meenacshaiya, Offg. Judge.

1893 October 4.

DEVE GOWDA, (DEFENDANT) *v.* KEMPE GOWDA, (PLAINTIFF).*

Malicious prosecution—Damages—Onus on plaintiff—Evidence.

In a suit for damages for malicious prosecution, the plaintiff must prove both malice and want of probable cause. The onus does not lie on the defendant to establish that his complaint was true. Where it is only proved that the plaintiff's house had been searched and that he had been kept in custody, it cannot be inferred that the defendant did not act *bonâ fide*.

*Appeal from appellate decree No. 71 of 1893 and 10 of 1893-94, against original decree No. 314 of 1892 of Mr. C. Cress, District Judge of Mysore, dated 5th June 1893, reversing decree No. 276 of 1892 of Mr. B. Sreenivasa Rao, Munsiff of Srirangapatam, dated the 22nd September 1892.

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DEVE GOWDA v. KEMPE GOWDA.

Mr. *L. Sreenivasa Iyengar* for appellant.

Mr. *Raghavachar* for respondent.

We have no hesitation in reversing the District Judge's decree and restoring that of the Munsiff. The point for determination is not whether the defendant was right in preferring a complaint against the plaintiff, but whether the evidence adduced by the plaintiff was sufficient to establish that the defendant made the complaint with the improper motive of injuring or disgracing him. The plaintiff had to make out that the defendant set the law in motion against him when he had no *bonâ fide* ground of complaint and the onus did not lie upon the defendant to establish that his complaint was true. The plaintiff proved nothing except that his house had been searched and that he had been kept in custody for a few weeks. There were no facts proved from which we might infer that the defendant did not act *bonâ fide*. We reverse the decree and dismiss the suit with costs throughout.

Appeal allowed. Suit dismissed with costs.

Before A. Ramachendra Iyer, Offg. Chief Judge and C. Meenacshaiya Offg. Judge.

1893 October 11.

SRIRUNGAMA (PLAINTIFF) *v.* SRINIVASA IYENGAR AND 5 OTHERS (DEFENDANTS).*

Defamation—Privilege—Excess—Penal Code (Act XLV of 1860) s. 499—Application to civil suits of principles of Penal Code regarding defamation—Measure of damages.

Certain statements were made in a petition to an amildar reflecting on the character of a Hindu widow and complaining that

* Appeal from appellate decree No. 6 of 1893, against original decree No. 138 of 1892 of Mr. C. Sreenivasa Iyengar, District Judge of Mysore, dated the 26th October 1892, reversing decree No. 300 of 1891 of Mr. C. B. Seshagiri Rao, Munsiff of Mysore, dated the 30th April 1891.

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she had been allowed within sacred places of a temple which was under the charge of the amildar. On a suit brought by her for damages for defamation it was *held* that the petitioners were interested in preventing the desecration of the temple, and the amildar had a corresponding duty to enquire into the matter. The allegations in the petition were therefore privileged in so far as they did not go beyond the facts and what the petitioners honestly believed. But as there were other imputations which were made by the petitioners recklessly and without due enquiry, and were entirely unsupported by evidence the petitioners were liable to damages in respect of such imputations. Inasmuch however as the character of the petition and the circumstances under which it was written proved the intention to be not so much to defame the plaintiff as to prevent the desecration of the temple and the petitioners were not actuated by malice in fact while the plaintiff was by no means free from blame, nominal damages of Rs. 10 and no costs would suffice.

Held further, that Chapter XXI of the Penal Code (Act XLV of 1860) codifies the law of defamation. It is the substantive law by which the criminal responsibility of a person is determined and there seems no reason why it should not be referred to for determining civil liability. It was so held by the High Court of Bombay in *Reg.* v. *Kikabhai Parbhudas*(1), of Madras in *Parvathi* v. *Mannar*(2), and Allahabad in *Abdul Hakim* v. *Tej Chandar Mukarji*(3); and following these rulings the question in the present case is, the language of the petition being undoubtedly defamatory, whether the defendants are protected by any of the exceptions to s. 499 of the Penal Code.

Mr. *Nunjundappa* for appellant.

Mr. *L. Sreenivasa Iyengar* for respondent.

The plaintiff claimed damages for defamation. The defamatory statements were made in a petition which the defendants forwarded to the Amildar of their Taluk and which ran thus :—

"1. We describe hereunder the acts voluntarily committed yesterday in this temple by Manegar and Parapathegar of this temple.

2. Srirangy, younger sister of Manegar Rama-

(1) 9 Bom. H. C., 460. (2) I. L. R. 8 Mad., 175.
(3) I. L. R. 3 All., 817.

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swamiengar, residing in this place, a widow, who has preserved her hair, conceived in the year 1881-82 in Madras, but she procured abortion for which a warrant was issued against her and she was tried in Madras; owing to guilt not being proved, she was discharged. However her caste people and her relatives fully believing that she was guilty of the offence, ceased to have any concern either with her or with persons connected with her. Persons who associated with her, *viz*:—Parapathegar Rangiengar, Manegar Ramaswamiengar, her foster-father, Mysore Chinnanah, her uncle Venkatarama Deekshita, Vedantachar, Kristnapur Naraniengar *alias* Ponnana consulted Dharmasastras in Sreerangarajapura and other Agrahars and underwent *prayaschitta* ceremony according to *sastras*.

3. They then passed an order prohibiting her association or interference in any assembly or temple matters. Sri Sri submitted a petition in this matter to Parakalaswamy: Swamy ordered that *prayaschitta* would not expiate her, that she ought not to enter sacred places such as temples, etc., and that her associates might enter into the temple after undergoing *prayaschitta* ceremony. This order was not made in writing. Since then, she has not entered Devasthanum or other sacred place. She has given up *sradhas*, etc., in use among Brahmins and has taken up a cloak which hides her widowhood. Your honor may personally observe her. Though Parapathegar was aware of this prohibitory order, he brought her yesterday into the temple to *sukanasi* where respectable persons such as *Matadhipathies* do generally stand, on the plea of *deepara-*

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dhani ceremony and gave her *theertha prasada*. We observed this irregularity and asked Parapathegar to explain it. He said to us 'I will neither enquire of it nor inform it to any one; if you want, take *vinayaga* or leave it'."

The defendants pleaded that the statements were true and that they submitted the petition to the amildar with the honest intention of protecting the interests of the temple.

The Munsiff of Mysore found that the imputations were false and malicious and awarded Rs. 70 to the plaintiff. The District Judge dissented from the Munsiff's findings. He was of opinion that the statements were substantially true although the language of the petition was exaggerated, and that the defendants made the imputations in the honest belief that they were true, and that they were bound to bring the facts to the notice of the amildar who was the officer in charge of the temple. He reversed the Munsiff's decree and dismissed the suit. The plaintiff has made a second appeal from the District Judge's decree.

There was abundant evidence to prove that the plaintiff's brother and other relations did not associate with the plaintiff, that she lived alone in her foster-father's house and that she was not invited to attend a marriage which was performed in her brother's house. The evidence which she adduced to prove that she regularly performed her husband's *sradham* was properly discredited by the District Judge. It was admitted that she continued to keep the hair on her head. Upon these facts the defendants were right in objecting to her admission into a

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sacred part of the temple. They honestly believed that she was not in caste and that by giving her *theertham* and *prasadam* at the *sukanasi*, the temple was desecrated. They were interested in preventing the desecration and they preferred a petition to the amildar whose duty it was to enquire into the matter. If they stated no more than what has been set out in this paragraph, the suit would be dismissed on the grounds that the imputations were true and that they were *bonâ fide* made to an officer who was entitled to know the truth.

But the defendants did not stop here. They boldly asserted that the plaintiff had committed abortion, and that, although she had been acquitted, she had been put out of caste by order of the Swamy of their Mutt, as they entertained no doubt of her guilt and as the sin did not admit of expiation by penance. And in their written statements they pleaded the truth of these imputations. There was no evidence at all that the plaintiff had been charged with the offence and that she had been put upon her trial. There was no evidence that the Mutt and her castemen had enquired into her conduct and had formally expelled her from caste. She and her foster-father left Mysore about ten years ago and travelled for a few months in the Madras Presidency. Shortly after their return home, they were arrested by the Madras Police and carried to Madras. These facts might have induced the defendants to suspect the plaintiff's character and conduct; but they did not justify the assertions which they made in their petition and in their pleadings. It may be conceded that there was no malice in fact, and that the de-

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fendants acted in the discharge of a social duty. But it admits of no doubt that they made serious imputations recklessly, *i. e.* when they had not made due enquiry. The point for determination is, whether under these circumstances they incurred civil liability.

The law of defamation has been codified in Chapter XXI of the Penal Code. This is the substantive law by which the criminal responsibility of a person is determined, and there seems no reason why it should not be referred to for determining civil liability. The High Court of Bombay was of opinion that the question of civil and criminal liability was indeed clearly identical. *Reg.* v. *Kikabhai Parbhudas*(1). The High Court of Madras refused to adopt the distinction which was made by the English law between libel and slander, and following the Penal Code ruled that an action for slander might be maintained without alleging special damages. *Parvathi* v. *Mannar*(2). In a case similar to the case before us, the High Court of Allahabad held that "when there is substantive law which can be appealed to for information and guidance, the safer course is to look there to ascertain some intelligible rule or rules by which determination of suits like the present should be regulated. Although the provisions of the Penal Code with regard to defamation are applicable to criminal charges, the principles therein embodied are well adapted to supply the tests by which the liability or otherwise of defendants to civil suits should be decided." *Abdul Hakim* v. *Tej Chandar Mukarji*(3).

(1) 9 Bom. H. C., 460. (2) I. L. R. 8 Mad., 175.
(3) I. L. R. 3 All., 817.

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The language of the petition being undoubtedly defamatory, the question arises whether the defendants are protected by Exceptions 1, 8 or 9 to s. 499 of the Penal Code. These Exceptions exempt a person from liability if the accusation or imputation was made in good faith *i. e.* " with due care and attention" (s. 52). The defendants might repel the charge by proving that they had acted with due care and caution, and that they had fair grounds for believing the statements which were contained in their petition. We have found upon the evidence that they made no enquiry and that there were no facts which might have led them as fair-minded persons to accuse the plaintiff of abortion. It follows that they injured the plaintiff's reputation when they alleged that she had committed the offence of abortion.

What is the amount of damages which the plaintiff may fairly claim is the last point which arises for decision. The character of the petition and the circumstances under which it was written prove that the intention of the defendants was not so much to defame the plaintiff as to prevent the desecration of the temple. That portion of the petition which referred to the alleged offence of abortion was wholly unnecessary and the occasion did not call for it. While they are properly held liable for the defamatory language, it must be borne in mind that they were not actuated by malice in fact. They have shown that the plaintiff did not lead the life of the orthodox, that she had been kept at a distance by her nearest relations, and that her presence in a sacred place in the temple was calculated to wound

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the feelings of the respectable portion of the community. We award Rs. 10 as damages and direct each party to bear his or her costs throughout.

Appeal allowed without costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 Nov. 13.

ABDUL RAHIMON SAIB OF THE FIRM OF MEER SABBE IBRAHIM SAIB (DEFENDANT) v. VENKATA BHIMACHAR AND OTHERS (PLAINTIFFS).*

Jodi—Attachment of village for arrears due to Government—Right of some co-sharers alone to sue for rent—Definition of rent in Mysore Land Revenue Code, 1888—Mohtarfa—Limitation Act (XV of 1877), Sch. II Arts. 110, 120, 132.

Where arrears of *jodi* were due to Government in respect of a certain village and under the Rules dated 15th November 1883 the village was attached and placed under Government management, some of the co-proprietors paid up the arrears due and obtained possession of the village with power to collect rent and taxes; *Held* that such co-proprietors could sue the tenants for arrears of rent without joining the other co-proprietors who had been neglectful of their intetests and not joined in the payment to Government.

Held also that *Mohtarfa*, being a payment made by a tenant to his landlord for the use of land for the purpose of erecting buildings on it in which he resides or carries on business, comes within the definition of "Rent" given in s. 3 (13) of the Mysore Land Revenue Code 1888, which is "whatsoever is paid or delivered in money or kind or whatever service is rendered by a tenant on account of the use or occupation of land let to him." *Mohtarfa* being thus rent simply and not a payment chargeable on the immovable property, a suit can only be brought to recover three years arrears, Art. 110 of Sch. II of the Limitation Act (XV of 1877) being aplicable.

* Appeal from appellate decree No. 69 of 1893 and 8 of 1893-94, against original decree No. 129 of 1892 of Mr. B. Tirumala Char, B.L., District Judge of Nagar, dated the 29th day of March 1893, modifying decree No. 627 of 1891 of Mr. Subba Rao, Munsiff of Chitaldroog, dated the 13th day of June 1892.

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Mr. *Lubeck* for Appellant.

Mr. *Vencata Ramia* for respondents.

The Judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

The advocate for the appellant, abandoning all the other grounds set forth in the appeal memorandum, urged for our consideration only these two points:—

1st. That the plaintiffs, who are not the sole proprietors of the Jodi Agasana Kallu village, were not entitled to sue for the arrears of *mohtarfa*, &c., claimed in the plaint, without making the other shareholders parties to the suit.

2ndly. That the claim for three out of the six years' arrears sued for was barred by limitation.

On account of arrears of *jodi* due to Government, the village was attached and placed under Government management under the Rules published with Government Notification No. 271, dated 15th November 1883. The shareholders, except the plaintiffs, were indifferent as regards their interests. The plaintiffs alone paid the arrears due to Government and obtained possession of the village with power to collect the rents and taxes due from the tenants of the village. The Government directed all the ryots or tenants of the village, of which appellant is one, to pay whatever was due by them as tenants to the plaintiffs, who were held responsible to Government for the due payment of the *jodi* (Vide *Exs. B* and *C*). In allowing the Government *jodi* to fall into arrears and suffering the village to be attached and taken possession of by the Government, the co-sharers of the plaintiffs acted prejudicially to their interests. Even after attachment, they did not care to join the

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plaintiffs in paying up the arrears and resuming possession of the village. Under these circumstances the plaintiffs, who, subsequent to attachment, obtained from the Government the possession and entire management of the village, were entitled to recover from the tenants the rents, &c., due by them and to arrange for the due payment of the sircar *jodi*, so as to prevent the attachment and sequestration of the village again to their (plaintiffs') prejudice. In this view, the plaintiffs had a right to bring this suit in their own names and without reference to the other co-shareholders.

The appellant is admittedly tenant of the plaintiffs' *jodi* village and as such is bound to pay *mohtarfa* and other taxes either as assessment or rent. Rent, as defined in s. 3 (13) of the Mysore Land Revenue Code, 1888, signifies "whatsoever is paid or delivered in money or kind, or whatever service is rendered by a tenant on account of the use or occupation of land let to him." If land is used by a tenant for agricultural purposes, he pays his landlord money assessment or rent in kind; if he uses the land for building purposes and resides or carries on business in premises on it, he has to pay *mohtarfa*; if the land is used for any special purposes, he has to pay a special tax according to rules or usage.

Whatever payments a ryot has thus to make fall under the head of "rent," and, when a suit for recovery of arrears of such rent is brought, it falls under Art 110 of the Limitation Act (XV of 1877) and not under Art. 120; and no more than three years' arrears are recoverable under it, unless the suit is brought to enforce payment of the money

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due upon the immovable property, when the twelve years rule prescribed by Art. 132 would apply.

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The present appeal relates only to *mohtarfa* and other minor payments, which are not sought to be charged upon the immovable property. Therefore, Art. 110 of the Limitation Act applies and the plaintiffs can only recover three years' arrears or a moiety of the amount awarded by the District Judge.

The decree of the lower appellate court will be modified accordingly. The appellant will pay the respondents' costs throughout, in proportion to the amount decreed.

Appeal allowed in part. Decree modified.

Before A. Ramachandra Iyer, Judge and P. N. Krishna Murti, Judge.

1893 *Nov.* 17.

THIMAPA (PLAINTIFF) *v.* LINGEE AND ANOTHER (DEFENDANTS.)*

Heirs of a married woman—Presumption as to nature of property left by a married woman—Mortgage by a person holding no title.

In the absence of evidence as to the character of property left by a married woman, it should not be presumed to be of such a nature as to make her relatives on the paternal or maternal side her heirs and successors.

If the acquisition was made with funds inherited from her husband, her relatives on the paternal or maternal side have no right whatever.

If she acquired money by prostitution, the property might devolve upon her husband's heirs.

Held therefore that a sister's daughter had no right, without proof that she had acquired a title by inheritance, to mortgage property left by a married woman; and the mortgagee had no right to take such property out of the possession of the foster-daughter of the deceased, to satisfy his debt.

* Appeal from appellate decree No. 16 of 1893, against original decree Nos. 218 and 305 of 1892 of Mr. C. Sreenivasa Iyengar, District Judge of Mysore, dated the 2nd day of November 1892, confirming decree No. 450 of 1891 of Mr. C. B. Seshagiri Rao, Munsiff of Mysore, dated the 30th day of June 1892.

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Mr. *L. Srinivasiengar* for the appellant.

Mr. *B. Nunjundappa* for the respondents.

The Judgment of the Chief Court (RAMACHENDRA IYER, and KRISHNA MURTI, JJ.) was as follows :—

The plaintiff sought to recover a debt due to him from the late Nanjee by sale of property which was hypothecated by her and which is now in the possession of defendant No. 2. The latter denied Nanjee's right to hypothecate the house.

The courts below have concurred in finding that the house was the property of Kadama, that defendant No. 2 was her foster-daughter, that Nanjee was her sister's daughter and that the latter possessed no interest in the house during Kadama's life-time. Upon these facts, it is clear that Nanjee had no right to make a mortgage unless it was proved that she had acquired a title by inheritance. Whether this title was made out is the only point for determination.

It was not proved when and how Kadama acquired the property. It may be that she acquired it with funds which she had inherited from her husband or with money which she had acquired by prostitution, or with property which had been given her by her parents. In the absence of evidence as to the character of the property, we ought not to presume that it was of such a nature as to make Kadama's relatives on the paternal side her heirs and successors, assuming that Nanjee could claim the property as sister's daughter.

If the acquisition was made with funds inherited from her husband, it is manifest that her relatives on the paternal or maternal side have not the shadow of a right.

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If she acquired money by prostitution as might be inferred from the District Judge's finding, the property might devolve upon her husband's heirs.

As Nanjee's title was not made out, we see no reason to disturb the decree made by the District Judge and we dismiss the second appeal with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 Nov. 22.

DENIA (1ST DEFENDANT) v. NARAINAPA (PLAINTIFF)*.

Limitation—Construction of Limitation Act—Appeal—Copy of decree—Time allowed by judge for filing copy.

Where an appeal was presented on the 72nd day after decree was passed, but the appellant was entitled to a deduction of 45 days for obtaining copy of the judgment, *Held* that his appeal was within time, although he had not filed a copy of the decree but did so subsequently with the time. The Limitation Act must be construed in such a manner as to retain the remedy and not to lose it.

Quære, whether the District Judge was correct in granting ten days time for the filing of a copy of the decree. A memorandum of appeal without such copy is incomplete and liable to be returned; and it is not clear that a judge can by his order extend the time prescribed by the Limitation Act for the filing of appeals in a correct form.

[Compare *Sadho Singh* v. *Mussammat Kishnee*(1).]

Mr. *S. Ramaswamier* for the appellant.

Mr. *Narainiengar* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, C. J., and KRISHNA MURTI, J.) was as follows :—

We cannot support the view taken by the District

* Appeal from appellate decree No. 77 of 1893, against original decree No. 70 of 1893 of Mr. C. Cress, District Judge of Mysore, dated the 18th day of May 1893, confirming decree No. 526 of 1892 of Mr. P. Vencata Rao, Munsiff of Mysore, dated the 30th day of November 1892.

(1) 3 N. W. P., 318.

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Judge in this case. We are of opinion that the appeal is not time-barred. The provisions of the Limitation Act must, it is well known, be construed in such a manner as to retain the remedy and not to lose it. The direction that the period for obtaining a copy of the judgment as also that of the decree should be deducted from computing the period of limitation, is very plain. The dates show that the appellant was entitled to a deduction of ten days in December, thirty-one days in January and four days in February, or to a total period of forty-five days. The decree was passed on the 30th November 1892 and the appeal was filed on the 10th February 1893. From a remark made by the judge, the copy of the decree was not furnished and it is not clear on what day it was produced. The judge granted ten days for this purpose and it may be presumed that this direction of the court was complied with. Turning back to the date on which the appeal was presented, it will be seen that that day was (thirty-one in December *plus* thirty-one in January *plus* ten days in February) the 72nd day after the decree was passed; and if the deduction of forty-five days, to which the appellant was entitled, is made, on the twenty-seventh day. The appeal memorandum was thus presented in court within the time prescribed by law, and its rejection on the ground taken by the judge is illegal.

It is immaterial to consider when the appellant applied for a copy of the decree. All the deduction he is entitled to is the interval necessary for obtaining the copy, which in this case is four days, from the 6th February to the 10th. As according to

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the calculation made by the judge the appeal was presented within thirty days, even without making a deduction on this account, we must hold that the appeal is within time.

Although this is our view of the objection taken by the Lower Appellate Court, yet we feel that we are free to express our doubt with regard to the correctness of the judge's proceeding in granting ten days' time for the filing of the decree. A memorandum of appeal without such copy is incomplete and is liable to be returned, and it is not clear that a judge can by his order extend the time prescribed by the Limitation Act for the filing of appeals in a complete form. As this question was not argued before us, we deem it unnecessary to say more on it.

This second appeal is allowed. The District Judge will restore the appeal to his file and dispose of it on the merits. The costs of the second appeal in this court will be paid by the respondent to the appellant.

Appeal allowed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

PARVATHY BAYEE AND ANOTHER (PLAINTIFFS) v. PUTAMA, (DEFENDANT NO. 1) NOW DECEASED, BY HER SON NANJE DAVARU (DEFENDANT NO. 2)*

1893 Nov. 27.

Gutta—Limitation—Res judicata—Admission—Liability of son as legal representative of his mother.

Land had been allotted by Government on favorable terms to the ancestors of the plaintiffs for the up-keep of certain temples;

* Appeal from appellate decree No. 42 of 1893, against original decree No. 241 of 1892 of Mr. C. Cress, District Judge of Mysore, dated the 31st day of December 1892, reversing decree No. 1315 of 1891 of Mr. B. Sreenivasa Rao, Munsiff of Sreerungapatam, dated the 12th day of July 1892.

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but as these terms were not adhered to, the favorable tenure was cancelled and the lands were fully assessed and registered in the names of the defunct temples. *Held*, that this change simply converted the *Inam* into *Kandayam*-paying land and did not affect the relative position of landlord and tenant previously subsisting between the plaintiffs and the defendants. *Also*, that the claim was not *res judicata*, because in the previous case relied on, the first plaintiff had no proper notice of the claim of defendant No. 2 nor was there any regular enquiry or adjudication upon their rights. *Further*, defendant No. 1 having admitted she was tenant of the plaintiffs but there being no privity of contract shown between them and her son, defendant No. 2, the latter was not liable in the present suit which was for *gutta* rent only. As however his mother died during the pendency of the suit, the decree should be against him as legal representative of his deceased mother to the extent of assets derived by him belonging to her estate.

Mr. *Nunjundappa* for the appellant.

Mr. *Ramaswamy Iyer* for respondent No. 2.

The Judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

The first question for decision in this appeal is, whether the District Judge was right in holding that the plaintiffs' suit filed on the 21st December 1891 was barred by limitation. He remarks, in the concluding portion of his judgment, that the defendants have been in adverse possession of the suit lands for more than twelve years. This finding is inconsistent with what the District Judge himself has found in another part of his judgment, namely, that the defendants ceased to pay rent or *gutta* in kind, after the lands were fully assessed by the Inam Department in 1880. The District Judge further finds, that defendant No. 1 was but a cultivating ryot till the year 1880 only, and, as such, paid the *gutta* or rent; so that, if there was any change at all in defendant No. 1's position, as tenant paying *gutta*,

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it must have taken place subsequent to the cancellation of the Inam grant made in favor of the plaintiffs' ancestors. The District Judge has erred in construing the mere cancellation of the Inam grant, in 1880, as a resumption of the lands by Government. It is true that the lands were originally granted as an endowment for the up-keep of certain temples. The grantees (the ancestors of the plaintiffs) having failed to carry out the object of the grant, the favorable tenure on which the lands were granted was cancelled by the Inam Department and the lands were fully assessed and registered in the names of the defunct temples; but the grantees or their successors were not deprived of the proprietory right they possessed in the lands. Nor did the Government take possession of or resume the lands and hand over the same to the defendants. The original grantees or their successors continued to be the landlords as they were before the Inam Settlement, and the original cultivators or their successors continued to be the *gutta* tenants as heretofore. The Government simply imposed full assessment, converting the Inam into a *kundayam*-paying land. This is all the change that was introduced by the Inam Department in 1880. It in no way affected the relative position of landlord and tenant which subsisted between the parties prior to the Inam settlement, which actually took place on the 9th September 1880, and this suit was filed within 12 years from that date. Then again, it was argued that the order which was passed in Mis. Case No. 126 of 1890, on the 23rd May 1890, was a bar to this suit, which was not laid within a year from the date

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aforementioned. The District Judge's judgment is silent on this point which was probably not pressed in his court. For reasons which are fully stated at great length in the Munsiff's judgment, we concur with him in finding, that plaintiff No. 1 had no proper notice of defendant No. 2's claim in that case and that there was no regular enquiry or adjudication upon the rights of plaintiff No. 1 and defendant No. 2. The order in Mis. Case No. 126 of 1890 is therefore not conclusive and binding on the plaintiffs.

Although the actual lease to defendant No. 1 is not clearly proved, it must be presumed from the fact that the *gutta* was paid by the defendant No. 1. In the face of the judgment passed against defendant No. 1 in suit No. 89 of 1877, she cannot be permitted to dispute the title of plaintiff No. 1. She admitted in her examination that she obtained the suit-lands from the plaintiffs' ancestors, that subsequent to the decree in suit No. 89 of 1877 she paid the *gutta* amount into court and obtained a receipt for it. She further admitted that she paid the *gutta* until the suit-lands were actually assessed, which was done only in September 1880. Thus, according to defendant No. 1's own admission, she was the tenant of plaintiff No. 1 till the year 1880. Defendant No. 2's allegation, that he was in exclusive possession and enjoyment of the land independently of his mother, defendant No. 1, can hardly be believed. It is true that there is no privity of contract between the plaintiffs and defendant No. 2, but, as defendant No. 1 is the tenant against whom plaintiff No. 1 obtained judgment in the suit of 1877, any private arrangement between the mother and son (defendants Nos. 1 and 2) as to

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the cultivation of the lands will not affect the plaintiffs' right. It seems to us that defendant No. 2, for the purposes of this claim, which is not a suit for ejectment but simply one for recovery of *gutta* for three years preceding the date of plaint, need not have been joined as a party nor could there be any decree against him for the *gutta*, as defendant No. 1 is the person directly and solely responsible to the plaintiffs. It is not shown that the relationship of landlord and tenant which subsisted between plaintiff No. 1 and defendant No. 1 in September 1880 was legally determined by the mere fact that the lands were fully assessed by Government, and defendant No. 1 is therefore liable for the plaintiffs' claim which must be decreed according to the plaint as against defendant No. 1. The District Judge's decision will be reversed and the Munsiff's decree restored as between the plaintiffs and defendant No. 1 with costs throughout. Defendant No. 2 will be absolved from liability to the plaintiffs claim and any costs incurred by him separately must be paid by the plaintiffs.

We did not notice at the time we wrote this judgment that defendant No. 1 was dead. The decree will hold defendant No. 2 liable, as the legal representative of his deceased mother, defendant No. 1, to the extent of assets derived by him belonging to the estate of the said deceased.

Appeal allowed in part with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1893 Nov. 29.

RUNGA RAGHAVENDRA NARSIMACHAR, A MINOR BY HIS GUARDIAN RUNGA RAMA NARSIMACHAR (DEFENDANT) v. TIRUMALA RUNGACHAR (PLAINTIFF).*

Joint debt—Suit by joint-debtor against son of other debtor—Liability of son—Liability of assets of family.

One of two joint debtors being compelled by the creditor to pay the whole debt, brought a suit (alleging he was only a surety) to recover the whole amount from the son of his co-debtor stating that the debt had been contracted for the son's benefit. It appeared that the father was alive though the plaint made no mention of this fact; but the plaintiff did not care to sue him, as he had been declared an insolvent.

Held, that, if the order in insolvency was no bar, the son, a minor, who was not a joint debtor, did not make himself liable for the debt and could not be sued. *Further*, the father being alive the question of pious obligation did not arise. *Further*, if the debt was for the benefit of the son it was for family purposes; and as the family was not properly represented no decree could be passed against its assets.

Mr. *B. Nunjundapa* for the appellant.

Mr. *S. Narayana Rao* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) was as follows :—

The plaintiff and the defendant's father jointly borrowed a sum of money from a Bank. The plaintiff alleged that he was a surety and that the defendant's father was the debtor. As the latter failed to pay the money within the time fixed for repayment, the Bank compelled the plaintiff to pay the same. He sued the defendant for the money, alleg-

* Appeal from appellate decree No. 20 of 1893-94, against original decree No. 148 of 1892 of Mr. C. Cress, District Judge of Mysore, dated the 22nd day of 1893, confirming decree No. 418 of Mr. C. B. Seshagiri Rao, Munsiff of Mysore, dated the 30th day of May 1892.

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ing that the defendant's father had contracted the debt for his benefit.

It would seem from the plaint that the defendant's father was dead and that the defendant succeeded to all his rights and liabilities. As a matter of fact, the defendant's father was alive and we believe is alive, but the plaint made no allusion to the fact and did not state the reason for exempting him from liability.

We gather from the Munsiff's judgment that the plaintiff did not care to sue the father as the latter had been declared an insolvent. If this was a fact and if the plaintiff was a scheduled creditor, he had of course no right to bring a separate suit. If he was not a scheduled creditor, he was not bound by the proceedings and there was no bar to a suit being filed against the father. The fact ought to have been clearly and specifically alleged in the plaint.

Let us assume that the order passed in the insolvency was no bar. The question arises whether the suit is maintainable against the son alone. The latter who is a minor was not a joint debtor and he did not make himself personally liable for the debt. The father being alive, the question of pious obligation does not arise. If the father contracted the debt for the benefit of the minor, it was a debt incurred for family purposes and the creditor might sue the father and son and claim to recover money by sale of the family property. No decree can be passed against the assets of the family, when the family is not properly represented before us. On this ground, we reverse the lower court's decree and dismiss the

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suit; but without costs, as the courts below have found in plaintiff's favor upon the merits.

Appeal allowed without costs.

Before A. Ramachendra Iyer, Judge and P. N. Krishua Murti, Judge.

1893 *December* 22.

ASWATHA NARAYANA SASTRY, HOLDER OF THE VILLAGE OF BIDAGAL IN THE HEGGADEVANKOTE TALUK (PLAINTIFF) *v.* CHOONCHA (DEFENDANT.)*

Trading—Shop-Tax.

Where the grower of betel leaves in his garden, situate elsewhere than in the village where he resides, collects the produce, stores it in his house and hawks it about to several places, *held* that such business does not amount to trading in the article. The betel-grower's house is not a shop because he occasionally sells a few leaves there, nor is he liable to be assessed with shop-tax.

Mr. *Narasimiengar* and Mr. *Nunjundappa* for the appellant.

Mr. *Raghavachar* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) was as follows :—

We did not call upon the respondent for a reply in this case, as we were not convinced that the District Judge was wrong in his interpretation of the order relied upon by the plaintiff. As a matter of fact, the evidence on record which was read to us did not show that the defendant was using his house as a shop, by which term we understand a place of business where selling is chiefly effected. If the grower of betel leaves in his garden, situate else-

* Appeal from appellate decree No. 24 of 1893-94, against decree No. 360 of 1892 of Mr. C. Cress, District Judge of Mysore, dated the 14th day of June 1893, reversing decree No. 101 of 1891 of Mr. B. Vencatachar, Munsiff of Nanjangode, dated the 24th day of September 1892.

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where than in the village where he resides, collects the produce, stores it in his house, and hawks it about to several places, we are not prepared to hold this business to amount to trading in that article, or to regard such house as a shop simply because he occasionally sells a few leaves there when a customer comes to him there. Both in fact and in law the conclusion at which the District Judge has arrived is correct, and we uphold his decision that the defendant is not liable to be assessed with shop-tax.

This second appeal is dismissed with costs.

Appeal dismissed with costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893 February 17.

JINKALA NARASIMAYA AND ANOTHER (DEFENDANTS NOS. 1 AND 3) v. LINGAPA AND ANOTHER (PLAINTIFFS).*

Declaratory Decree—Possession—Specific Relief Act (I of 1877) s. 42 —Vague issues—Objection first taken specifically in the appellate court.

Where the plaintiffs sued for a declaration of their right to a certain village and it was proved that the defendants were in possession, *held*, that, possession being a relief which the plaintiffs have to obtain in consequence of their right, the suit for declaration alone is not maintainable under s. 42 of the Specific Relief Act (I of 1877).

An issue in such vague terms as "Is the suit, as brought, maintainable?" is objectionable; but in the present case, as it brought the question before the parties at the trial, it did not seem to be prejudicial to the plaintiffs to permit the objection under s. 42 of the Specific Relief Act to be taken in the appellate court.

Mr. *S. Ramaswamier* for the appellants.

Mr. *S. Narayana Rao* for the respondents.

The Judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows :—

* Appeal No. 60 of 1892, against original decree No. 312 of 1890 of Mr. Ramaswamiyengar, Munsiff of Bangalore, dated the 27th day of October 1891.

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The appellants in this case are defendants Nos. 1 and 3 and on their behalf an objection was taken by their learned advocate, that the suit as laid by the plaintiffs for a declaratory decree is opposed to s. 42 of the Specific Relief Act, and liable to be dismissed.

Although this objection was not specifically taken in the lower court, the plaintiffs' possession was denied and an issue was framed in the following words :—

"Whether * * half the village has been since the date of sale, in possession and enjoyment of the plaintiffs ?

The 8th issue was put very vaguely as follows :—

"Is the suit, as it is brought, maintainable ?"

We have more than once taken objection to such vague issues, but as the question whether the suit is maintainable or not, was thus before both the parties, we do not think that the plaintiffs are prejudiced by this objection being taken in this court. They have in fact no other evidence than what is on record to rely upon, and the appellants are thus, in our opinion, entitled to have their objection decided.

Regarding the issue as to possession, we note that the munsiff does not decide it. His finding is not very specific, as it refers to "such rights as Narasingapa possessed in the village." We have therefore to decide this point from the evidence on the record.

Notices are filed intimating that the village was taken under attachment and kept under sircar management. This notice was served in October 1888. Exhibit XII dated 30th April 1890 is an order from

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the Taluq Cutcherry, putting defendant No. 1 in possession of three shares of the village. The plaintiffs' 1st witness has stated that the plaintiffs provided for Paditara Deeparadhana till the Government attached the village two years ago. Here is a distinct statement that the plaintiffs' possession and management were interrupted when the Government attachment took place. The exhibit already referred to shows that when the attachment was withdrawn, the defendants were put in possession. The plaintiffs' second witness has also sworn to the effect that the village was given into his possession. A confirmation of the same fact is spoken to by the plaintiffs' fourth and fifth witnesses. Plaintiff No. 1 himself admitted that "this quarter share did not come to our possession, for the village was by that time attached."

Against this evidence, the respondents' advocate pointed out a few statements of the witnesses, that plaintiff No. 2 was in possession of and cultivating some of the lands in the village. But it is said that there were *zirayat* lands of Narasingapa which, during his sickness, were cultivated by Gooroomoortiapa, plaintiff No. 2. Such possession does not amount to possession of the village. This issue of fact, we must, therefore, find in the negative.

The application of the law is now clear. Section 42 of the Specific Relief Act directs that "no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

The plaintiffs' case is, that not only the right to the village is vested in them, but that, in exercise of

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such right, they are entitled to the possession of the village. Their allegation that they are in possession is not true. Possession is with the defendants and it is a relief which the plaintiffs have to obtain in consequence of their right. The suit for declaration alone is not maintainable, and the objection taken by the appellants must prevail.

The Munsiff's decree is accordingly reversed and the suit ordered to be dismissed. As the defendants did not take this objection specifically in the lower court and the plaintiffs' suit fails on a technical ground, we make no order about costs.

Appeal allowed. No costs.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer, Judge and C. Meenacshaiya, Offg. Judge.

1893 *March* 20.

VENKATARAMANA SHETTI (DEFENDANT No. 2) v. BHERI SHAMANA (PLAINTIFF).*

Partition—Code of Civil Procedure (Act XIV of 1882) s. 396—Procedure—Jurisdiction—Mysore Civil Courts Regulation of 1883, s. 10.

The plaintiff purchased at court-sale one-sixth share, undefined and unascertained, of certain property and sued the joint owners for partition and possession of such share, in the munsiff's court. The entire value of the whole property was beyond the jurisdiction of the munsiff under s. 10 of the Mysore Civil Courts Regulation of 1883.

Held by the Chief Court (THUMBOO CHETTY, C. J. and C. MEENACSHAIYA, J. RAMACHENDRA IYER, J. dissenting) that the Munsiff had not jurisdiction. For purposes of partition the court must exercise jurisdiction over the whole house which is the subject-matter of the suit and before putting the plaintiff in possession of his one-sixth share, has to determine which portion of the house has to be given to the plaintiff and whether the share so given to him re-

* Appeal No. 205 of 1892, against original decree No. 825 of 1891 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 20th day of April 1892.

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presents the full market-value of his one-sixth share in the whole house. To enable the court to do this it may be necessary to award payments of sums by one sharer to another to equalise the value of the shares of the several co-parceners, following the procedure indicated in s. 396 of the Code of Civil Procedure. The case is distinguishable from those where a suit is brought for an ascertained share or portion of property, when no general partition is required, and also from suits for partition of immovable property paying revenue to Government, which are excluded from the purview of s. 396 of the Code of Civil Procedure. In suits for partition of lands not paying rent to Government the procedure laid down in that section must be followed: and to enable the court to act up to its provisions, there must be jurisdiction over the whole subject-matter. As stated by the Madras High Court in *Nagamma* v. *Subba*(1) the court should have at its disposal, for the purposes of the suit, the whole property to adjudicate upon the plaintiff's claim.

Per RAMACHENDRA IYER, J.—I fail to perceive how s. 396 of the Code of Civil Procedure, which enables a court to make a partition though commissioners affects the question of jurisdiction. * * The mode in which the court should proceed to decree in such cases is laid down by the Calcutta High Court in *Bhoobun Moyi Dabea* v. *Shurut Sundery Dabea*(2) * * * . I am further of opinion that the section applies to all suits for partition of immovable property, notwithstanding the use of the words "immovable property not paying revenue to Government." * * * The question "What is the subject-matter of a suit for partition?" is replied to by WEST, J. in *Lakshman Bhatkar* v. *Baraji Bhatkar*(3) as "the jural relation between the parties as alleged by one and denied by the other, and that, in the case of a single aliquot part, is the ownership of such part." Upon this principle it was always held that a suit for partition was cognisable by a court if the value of the share sued for was within its jurisdiction, although the value of the whole property was beyond it. This rule was departed from in regard to suits by Hindu co-parceners for division of family property, for the reason that in such a suit the court had more to do than merely give the plaintiff possession of his share. This duty is not cast upon a court in other suits for partition. If a Mussalman sues for his shares or if a joint tenant sues for his share, what is his share is the only question and if the value of that share is within the cognisance of a Munsiff, I do not see why he should not try the suit.

(1) I. L. R. 11 Mad., 197. (2) I. L. R. 12 Cal., 279.
(3) I. L. R. 8 Bom., 34.

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Venkataramana Shetti v. Bheri Shamana.

Mr. *D. Venkataramia* for the appellant.

Mr. *S. Narasimiengar* for the respondent.

The following judgments were delivered by the Chief Court:—

Thumboo Chetty, C.J.—This case is distinguishable from that which formed the subject of Miscellaneous Appeal No. 64 of 1892(1). In that case, the plaintiff sued to recover a particular share in a house which was originally divided between himself and his brothers, alleging that subsequent to division he was in actual possession and enjoyment of his share till he was wrongfully dispossessed or deprived of that share. In a case like that, where the plaintiff sued to recover possession of a particular share in a house which was in his possession and which he had for some reason or other lost, no fresh partition of the whole house is necessary. The plaintiff, if he succeeds, will be put in possession of the particular share which was once in his possession and enjoyment. In the present case, the plaintiff purchased at a court-auction defendant No. 1's one-sixth share in the suit-house. That share was undefined and unascertained, as defendant No. 1 and his other coparceners were in the house without effecting, as between themselves, any actual division or partition. To enable the court to put the plaintiff in possession of his one-sixth share, the whole house must be divided into six shares between the plaintiff and the other co-parceners of defendant No. 1 and whatever may fall to the plaintiff's one-sixth share has to be separated and given over to the plaintiff. It seems to me, therefore, that, for purposes of partition, the court must exercise jurisdiction over the whole house

(1) *See* Appendix.

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which is the subject-matter of the suit and, before putting the plaintiff in possession of his one-sixth share, has to determine which portion of the house has to be given to the plaintiff and whether the share so given to him represents the full market value of his one-sixth share in the whole house. To enable the court to do this, it may be necessary to award payment of sums by one sharer to another, to equalise the value of the shares of the several co-parceners, following the procedure indicated in s. 396 of the Code of Civil Procedure.

The entire value of the suit-house exceeds Rs. 1,000 which is beyond the pecuniary jurisdiction of the munsiff.

Section 10 of the Mysore Civil Courts Regulation of 1883 provides that the jurisdiction of a munsiff shall extend to all original suits and proceedings of a civil nature, not otherwise exempted from his jurisdiction, of which the amount or value of the subject-matter does not exceed Rs. 1,000.

It is admitted that the value of the whole house exceeds Rs. 1,000, but it is contended that as the plaintiff, as purchaser at a court auction, seeks to recover only one-sixth share in the house and the value of that share is less than Rs. 1,000, the munsiff has jurisdiction.

In a suit brought for the partition of family properties, it was held by this court in *Siddalinga Shetty* v. *Sidda Bassiah*(1) following the ruling of the Madras High Court in *Vydinatha* v. *Subramanya*(2) that the munsiff had no jurisdiction, as the

(1) 9 M. L. R., 254. (2) I. L. R. 8 Mad., 235.

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value of all the property, a share in which was claimed, exceeded the munsiff's pecuniary limit.

In the case of *Nagamma* v. *Subba*(1) the plaintiff, who was one of a large number of *agraharamdars*, sued for the ascertainment, partition and delivery to him of his share. All those who had any interest in the *agraharam* were made parties. Some of the defendants were tenants liable to pay rent. The munsiff passed a decree, according to an amicable arrangement come to between the parties. When the question of jurisdiction came up before the High Court, the Chief Justice, Sir Arthur Collins and Brandt, J. said:—"We can draw no distinction between the one case (*Vydinatha* v. *Subramanya*(2)) and the other. The principle is, that where it is necessary to ascertain and decree to a plaintiff a share in undivided property, it is necessary that the court should have before it and at its disposal, for the purposes of the suit, the whole property, in order to adjudicate upon the claim to the share claimed, and, if the claim is allowed, to separate and give possession of such share; and this is necessary no less in the case before us than in a suit for partition of family property."

In the case of *Khansa Bibi* v. *Syed Abba*(3) the plaintiff sued to be declared an heir to a deceased Mahomedan and to recover her share of the inheritance. The Chief Justice and Justice Parker said that the plaintiff merely asked for her definite share or its money value, which was within the munsiff's jurisdiction. The reason for upholding the

(1) I. L. R. 11 Mad., 197. (2) I. L. R. 8 Mad., 235.
(3) I. L. R. 11 Mad., 140.

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munsiff's jurisdiction was obvious. If the part share to which the plaintiff was entitled was defined and ascertained and an alternative relief was asked for, *i.e.*, possession of the particular share or payment of its money value, no general partition would be necessary. That case is clearly distinguishable from the present.

The case of *Ganapati* v. *Chattur*(1) is also not in point. It was there held (*per* MUTTUSAMI AYYAR, J.) that "a karnavan suing to establish his right of management is not entitled to institute his suit in the court of the district munsiff when the value of the suit would exceed Rs. 2,500 (the munsiff's pecuniary limit), if it were valued as a suit for possession."

In *Ramayya* v. *Subbarayulu*(2), the plaintiff sued for one-seventh of an *agraharam*. Out of 862 acres of dry and wet land, he claimed one-seventh share. The whole lands were worth more than Rs. 2,500, but the value of the one-seventh share was within the munsiff's jurisdiction. The suit was filed in the district court and it was contended that it should have been filed in the munsiff's court. The High Court (Muthusami Ayyar and Parker, JJ.) said "The jural relation between the parties to the suit was not that of co-parceners as in the case of *Vydinatha* v. *Subramanya*(3) but that of joint owners of an *agraharam* village. Having regard to the principle laid down in *Khansa Bibi* v. *Syed Abba*( ) we are of opinion that the subject-matter of the suit was the specific share claimed and that the suit ought to have been brought in the court of the district munsiff."

(1) I. L. R. 12 Mad., 223; at p. 225. (2) I. L. R. 13 Mad., 25.
(3) I. L. R. 8 Mad., 235. (4) I. L. R. 11 Mad., 140.

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I fail to see any difference between this case and that of *Nagamma* v. *Subba*(1) to which no allusion has been made.

In *Krishnasami* v. *Kanakasabai*(2) the plaintiff sued for eight out of $28\frac{15}{16}$ *pangus* or shares of certain lands sold to him by defendant No. 3, who purchased the same at a court auction. Defendants Nos. 1 and 2 prevented the plaintiff from taking possession. It was contended that the sub-judge had no jurisdiction as the value of the eight *pangus* was within the munsiff's jurisdiction. The Chief Justice and Justice Shepherd, following the cases of *Khansa Bibi* v. *Syed Abba*(3) and *Venkatarama* v. *Meera Labai*(4) held that, as the plaintiff and defendants did not stand in the relation of co-parceners to each other, the value of the plaintiff's share determined the jurisdiction.

The judgment in *Venkatarama* v. *Meera Labai*(4) did not refer to the valuation of the suit for purposes of jurisdiction but decided the question, whether a purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property can sue for a partition of that portion alone. Defendants Nos. 1 and 3 in that case were brothers, the other defendants were their sons, all living together as members of an undivided Hindu family. The land which was the subject-matter of the suit was ancestral property. Defendant No. 1 sold his half-share to the plaintiff in specific land. It was there held that the purchaser of a co-parcener's share can take no higher

(1) I. L. R. 11 Mad., 197. (2) I. L. R. 14 Mad., 183.
(3) I. L. R. 11 Mad., 140. (4) I. L. R. 13 Mad., 275.

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right than his vendor possesses and that is not a right to a certain share in each particular item of the family property, but a joint right with the other co-parceners to the ownership and enjoyment of each individual item with an incidental right to obtain a partition of the whole family property and have his share therein made over to him after due provision for the family debts and liabilities. The plaintiff was required to file a partition suit against the other members of the family for the ascertainment of the share of his vendor and for the allotment to himself of his vendor's share in the particular portion to which he was entitled.

This decision is inapplicable to the present suit, as it is alleged by the plaintiff that all the family property, except the suit-house, were divided between defendant No. 1 and his co-parceners, and that there is only the house that is left undivided. The plaintiff could therefore maintain this suit for a partition of only the house and for apportionment to him of his one-sixth share. But, for purposes of such partition and division, the plaintiff, as decided by the Madras High Court in the case quoted above, stands in the shoes of defendant No. 1, whose one-sixth share he purchased and the partition has to be effected as between himself and the co-parceners of defendant No. 1. It would still be a suit for partition of immovable property *not paying revenue to the Government*, falling within the purview of s. 396 of the Code of Civil Procedure.

In *Murahary Sastry* v. *Subbannah*(1) decided by this court, the plaintiff sued for partition of a village

(1) 14 M. L. R., 193.

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and to recover possession of one-eighth share. The value of the whole village was Rs. 3,000 and the munsiff held he had no jurisdiction. My learned colleagues A. Ramachendra Iyer and P. N. Krishna Murti, JJ. held that as the subject-matter was the specific share claimed by the plaintiff, the value of that share determined the question of jurisdiction. The village which was in suit was apparently a village paying revenue to Government. The case therefore did not fall under s. 396 of the Code of Civil Procedure. Likewise the Madras cases of *Ramayya* v. *Subbarayulu*(1), *Venkatarama* v. *Meera Labai*(2) and *Krishnasami* v. *Kanakasabai*(3) related to *lands paying revenue to Government,* the partition of which had to be effected through the Collector under s. 265 of the Code of Civil Procedure.

The circumstances of each case have to be considered in determining the question, what is the subject-matter of the suit and whether the court has to exercise jurisdiction over the whole subject-matter and to adjudicate upon and adjust the rights of all the parties interested in the same. The plaintiff wants, in this case, a certain house to be divided and to be put in possession of his one-sixth share. What particular portion of the house should be allotted to him, has to be decided after ascertaining the shares of each of the defendants now in possession of the house. This can be done only by adopting the procedure indicated in s. 396 of the Code of Civil Procedure. The court has first to ascertain whether the plaintiff is entitled to a partition and to the apportionment to him

(1) I. L. R. 13 Mad., 25. (2) I. L. R. 13 Mad., 275.
(3) I. L. R. 14 Mad., 183.

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of his one-sixth share, and who are the other persons entitled to the remaining five-sixth shares. The court has next to pass a preliminary decree and to appoint a commissioner or commissioners to make the partition under s. 396 of the Code of Civil Procedure, and, upon receipt of the commissioner's report, pass a final decree. *Gyan Chunder Sen* v. *Durga Churn Sen*(1). The principle laid down in *Ashanullah* v. *Kali Kinkur Kur*(2) has also to be borne in mind. "If a property can be partitioned without destroying the intrinsic value of the whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to the plaintiff by partition." Cl. 2 of s. 396 of the Code of Civil Procedure, therefore, very wisely provides that "the commissioners shall ascertain and inspect the property and shall divide the same into as many shares as may be directed by the order under which the commission issues and shall allot such shares to the parties and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalising the value of the shares." In the present case, the munsiff cannot adjudicate upon the plaintiff's claim and do complete justice between the parties, unless he follows the procedure laid down in s. 396. To enable him to act up to the provisions of this section, he must have jurisdiction over the whole subject-matter. As stated by the Madras

(1) I. L. R. 7 Cal., 318. (2) I. L. R. 10 Cal., 675; at p. 676.

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High Court in *Nagamma* v. *Subba*(1) the court should have at its disposal, for the purposes of the suit, the whole property to adjudicate upon the plaintiff's claim. As the value of the whole house exceeds Rs. 1,000, the munsiff's jurisdiction is ousted. In this view, I would set aside the munsiff's decree and return the plaint for presentation to the proper court. But as, owing to the conflict of decisions bearing upon the point, the plaintiff has made a mistake in filing the suit in the munsiff's court, I would direct each party to bear his or their own costs incurred up to date.

MEENACSHAYA, J.—I concur with the judgment of the learned Chief Judge and would set aside the munsiff's decree. I also concur in his order regarding costs.

RAMACHENDRA IYER, J.—The plaintiff alleged that defendant No. 1 and others were co-parceners, that they divided their family property into six shares and allotted one share to defendant No. 1 and that in the house in suit one out of six shares was allotted to him. The plaintiff having acquired his right by purchase sued for partition and for possession of one-sixth share.

The Munsiff of Bangalore decreed the claim. The defendants appealed. One of the grounds of appeal was, that the subject-matter of the suit was the whole house, and that, as the value of the house was above Rs. 1,000, the munsiff had no jurisdiction to try the suit. In the course of the argument, it was suggested that a partition had to be made under s. 396 of the Code of Civil Procedure, and

(1) I. L. R. 11 Mad., 197.

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that it could not be made except by a court which had jurisdiction over the whole house. The point was referred to a Full Bench.

I will first discuss the applicability of s. 396 to the question before us. The first paragraph enacts that, if the partition of immovable property is necessary, the court shall ascertain the parties who are interested in the suit-property and their several rights therein and issue a commission to any person to make a partition according to such rights. The second paragraph empowers the commissioners to divide the property into as many shares as may be directed by the order, to allot such shares to the parties, and, if authorized by the court, to award sums to be paid for the purpose of equalising the value of the shares. The last paragraph directs the court to hear objections, if any, to the commissioner's report and if it confirms it to pass a decree in accordance therewith. These paragraphs contain directions as to the mode of effecting a partition. The number of sharers and their respective interests in the property being ascertained, a partition is made by putting the plaintiff or plaintiffs in possession of his or their shares, and if the property cannot be conveniently divided, compensation in money is awarded to any sharer if the decree so directs. It is true that the whole property must be inspected and valued in order to enable the commissioners to determine the most effectual mode of making a partition. But their function is only to divide the property into as many shares as may be directed and to allot such shares to the parties, *i. e.*, as I understand these words, the commissioners are to put the plaintiffs in possession of

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the shares allotted to them by the decree, or to give them a share and compensation, or compensation only. In order to give a plaintiff possession of a sixth share, they have no power to fix the boundaries of the shares of the remaining five owners and to put each of them in possession of his share. They are bound to obey the decree of the court and the court can only decree a partition so as to give a plaintiff what he is entitled to. It has no power to compel the defendants to become divided members and to decree separate shares to each. I fail to perceive how the section which enables a court to make a partition through commissioners affects the question of jurisdiction. There might be some force in the argument if the section was recently enacted and we had to construe it for the first time. This has been the law since 1877 and none of the High Courts has treated it in the light in which we have been invited to treat it. The usage of all the High Courts is sufficient to convince one that there is not the remotest connection between the question of jurisdiction and the section before us.

As the section directs how a decree for partition should be prepared and as I know that the direction is invariably ignored by our courts, I may take this opportunity of making an extract from the judgment in *Bkoobun Moyi Dabea* v. *Shurut Sundery Dabea*(1). "We think it is to be regretted that, in dealing with suits for partition of immovable property * * * the lower courts should be in the habit of passing what are termed decrees in the suits containing merely declaratory orders, leaving still open for determination

(1) I. L. R. 12 Cal., 279.

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the main issues. Such matters should be decided before any decree is passed and this would seem to be contemplated by s. 396, which refers to proceedings in a suit." In a suit for partition, a court is bound to pass a preliminary order in terms of the first paragraph of s. 396, and to appoint a commissioner to ascertain the property which would fall to the plaintiff's share; and when the report is confirmed, to *pass a decree* in accordance therewith.

I am further of opinion that the section applies to all suits for partition of immovable property, notwithstanding the use of the words "immovable property not paying revenue to Government." The section was not apparently intended to apply to petty ryotwar holdings and accordingly the Madras High Court and the Madras Government have left it to the ordinary courts to divide lands paying revenue to the Government.

If we do not adopt this construction, we shall have to direct a Deputy Commissioner to divide a field and an Amin to divide a house in every petty suit for partition. We have all along acted on the assumption that courts have power to divide lands paying revenue to Government and this need not be altered.

Having found that s. 396 has no bearing on the question, we have to consider whether there is anything in our Civil Courts' Regulation which affects the munsiff's jurisdiction. A suit is cognizable by a munsiff if the amount or value of the subject-matter does not exceed Rs. 1,000 (s. 10). The question is what is meant by "the subject-matter of a suit for partition?" The observations made by Justice

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West in *Laksman Bhakar* v. *Baraji Bhatkar*(1) are pertinent—"What is sought is the true measure of the subject-matter, not what the suit is about in a wider and vague sense. It has been contended that the subject-matter of a partition suit by one who claims his share from the other co-parceners is the whole joint estate. In a sense this is so. The land and goods as a whole are the material substratum of the proprietary right, a part of which the plaintiff seeks to enforce. But in the sense of the Act, we think the subject-matter is the jural relation between the parties as alleged by one and denied by the other, and that, in the case of a single aliquot part, is the ownership of such part. Materially this is embraced in the aggregate estate, which is thus itself also the subject-matter, but more remotely, and, not in a sense conformable to that in which subject-matter must be understood in analogous cases."

It was upon this reasoning that the Madras High Court ruled in *Nagamma* v. *Subba*(2) and *Krishnasami* v. *Kanakasabai*(3) that a suit for partition was cognizable by a munsiff if the value of the share sued for was within his jurisdiction, although the value of the whole property was beyond it.

So far as I know, this was the principle which was followed in all suits for partition, whether brought by Hindus or Mussulmans for division of family property, or brought by a joint-owner for possession of his share.

This rule was departed from in *Vydinatha* v. *Subramanya*(4) in regard to suits by Hindu co-

(1) I. L. R. 8 Bom., 34. (2) I. L. R. 11 Mad., 197.
(3) I. L. R. 14 Mad., 183. (4) I. L. R. 8 Mad., 235.

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parceners for division of family property. This court followed that ruling and held that, in such a suit, the subject-matter was the joint family property and not merely the share sued for. The reason of the ruling was that in a suit of that kind, a court had to do something more than give the plaintiff possession of his share. It might have to set apart property for the maintenance of a widow and to provide for its division after her death. It might have to set apart a fund for a marriage and to provide for its redistribution if the contemplated marriage did not take place. This duty is not cast upon a court in other suits for partition. If a Mussulman sues for his share, or if a joint tenant sues for his share, what is his share is the only question, and if the value of that share is within the cognizance of a munsiff, I do not see why he should not try the suit. I have not been convinced that the rulings of the High Courts of Bombay and Madras are wrong, or that the practice of our courts requires alteration.

In the case before us, the co-parceners have agreed to hold the house in severalty; only no specific share has been allotted to each. The plaintiff having purchased the share of one co-parcener seeks to obtain possession. The questions which might arise if there was a suit by a Hindu for partition of joint family property do not arise here. That being so, I am of opinion that the munsiff had jurisdiction, as the value of the share sought was below Rs. 1,000.

Appeal allowed without costs.

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Before T. R. A Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1893 *March* 29.

KOOTHARAI NANJAPA, (PLAINTIFF) *v.* KOOTHARAI MULANA, SINCE DECEASED, BY HIS WIDOW, AKAMA, AND ANOTHER (DEFENDANTS).*

Minor—Suit to set aside decree—Limitation—Limitation Act (XV of 1877) Sch. II Art. 123.

In 1870 a suit was brought by *M* to set aside a will made by *B* and to obtain possession of the latter's property. To this suit *N* was a party defendant, and being then a minor was represented by his father and guardian *C*. The suit was settled by arbitration, and a decree was given in terms of the award, under which *M* took the property and paid Rs. 1,400 to *N* by his father and guardian *C*.

N attained his majority in 1884 and in 1891 filed a suit against *M* to recover the property. *Held* that art. 123 of sch. II, Limitation Act (XV of 1877) did not apply: and the suit was barred as it was not brought within three years from the date the plaintiff attained majority.

THUMBOO CHETTY, C. J.—This is not a suit against the executor to the will of the deceased *B* or his heirs. It is brought on the allegation that *M* took wrongful possession of the estate and was a wrong-doer. He got the will set aside by an award to which the plaintiff's father and guardian was a party and the alleged wrongful possession commenced more than twenty years prior to the institution of the suit. The suit cannot be regarded as one by a legatee for recovery of his legacy under the Limitation Act, Sch. II Art. 123.

RAMACHENDRA IYER, J.—The decree passed in the former suit was *primâ facie* binding upon the plaintiff as he was a party to it. No circumstances have been proved which can raise a suspicion, much less a presumption, that the plaintiff's father did not protect his interests, that the then plaintiff's case was fictitious and that there were no grounds for a compromise. No fraud has been established and no ground has therefore been made out for setting aside a decree made by a competent court.

Mr. *Ramaswamier* for the appellant.

Mr. *Narayana Row* for the respondent.

* Appeal No. 367 of 1892, against original decree No. 37 of 1891 of Mr. T. Narahari Row, District Judge of Nundidroog, dated the 29th day of August 1892.

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The following judgments were delivered by the Chief Court:—

THUMBOO CHETTY, C.J.—The plaintiff sued to recover certain movable and immovable properties under a will left by one K. Basapa. The will is dated the 18th September 1870. Basapa died soon afterwards. In November 1870, defendant No. 1's deceased husband, Mulana, sued to recover the property of the deceased Basapa, on the ground that the will was false and that he was entitled to the whole property under an arrangement entered into between himself and the deceased. The present plaintiff was defendant No. 2 in that suit and was represented by his father and guardian, Chikana. The parties agreed to an award made by certain arbitrators and the court allowed the suit to be compromised on the 23rd February 1871. The plaintiff's father was a consenting party to the award and compromise. The award set aside the will, and directed payment by Mulana to the plaintiff of Rs. 1,400, and further directed that Mulana should take possession of all the property of Basana and maintain the widow of the latter. From the evidence of defendant's 1st witness, who was one of the arbitrators, it appears that, out of the Rs. 1,400 paid to the plaintiff through his father and guardian, a house and shop were purchased and that the plaintiff is now in possession of those properties. In February 1871, it is admitted in the plaint, defendant No. 1's husband Malana took possession of all the property of Basapa. Such possession was adverse to the plaintiff's rights if the will was valid. The plaintiff attained majority in 1884 and it was open to him,

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if he did not acquiesce in the award of compromise agreed to by his guardian, to take steps to set aside the same within three years after he attained majority. This he failed to do. This suit was not filed till August 1891 and it is therefore clearly barred by limitation.

It was argued that Sch. II Art. 123 of the Limitation Act applies to this case. This is not a suit against the executor to the will of the deceased Basapa or his heirs. It is brought on the allegation that Mulana took wrongful possession of the estate and was a wrong-doer. He got the will set aside by an award to which the plaintiff's father and guardian was a party and the alleged wrongful possession commenced in February 1891, or more than twenty years prior to the institution of this suit. It is true that, under the will, the property of Basapa was made deliverable to the plaintiff on his attaining majority, and if this is to be regarded as a suit against an executor or an executor *de son tort* representing the estate of the deceased Basapa, the twelve years allowed by Sch. II Art. 123 may be computed from the date on which the plaintiff attained majority; but the deceased Mulana ignored the will, got it actually cancelled and took possession of the property in his own right and independent of the will; this suit cannot, therefore, be regarded as a suit by a legatee for recovery of his legacy under Art. 123. *Sithamma* v. *Narayana*(1). The suit is clearly barred, as it was not brought within three years from the date the plaintiff attained majority. Even on the merits, as there was a dispute as to the will and a *bonâ fide* compromise under which the plaintiff

(1) I. L. R. 12 Mad., 487.

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got Rs. 1,400, which represented more than half the value of the property left by Basapa, the plaintiff cannot complain, and the suit moreover was not brought to set aside that compromise within three years after the plaintiff became major. The appeal must, therefore, be dismissed with costs.

RAMACHENDRA IYER, J.—The deceased Basapa bequeathed all his property to the plaintiff and appointed the plaintiff's father to manage affairs during his minority. Within a few days after the death of the testator, a suit was commenced by the defendant's deceased husband against the testator's widow and the minor devisee. The ground of action (so far as we can judge from what has been preserved of the record of that suit) was, that the testator was incapable of making a will and that, even if it was true, it was not valid. The devisee's father, who was his guardian, contested the claim. Issues were settled, and, on the day fixed for final hearing, the plaintiff examined his witnesses and closed his case. Thereafter there were negotiations for a compromise, and eventually a compromise was made in accordance with the award made by the arbitrators, to the effect that the devisee was to be paid Rs. 1,400, and that the testator's property was to be delivered to the then plaintiff. A decree was made accordingly.

The devisee, the present plaintiff, has sued for possession of the testator's property, alleging that the defendant's husband (plaintiff in the former suit) took wrongful possession.

The decree passed in the former suit was *primâ facie* binding upon the plaintiff, inasmuch as he was

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a party to it. If he was well-advised, he ought to have alleged in the plaint that the decree was not binding upon him, inasmuch as the compromise was the result of fraud, or that it was not otherwise legal and valid. However, the validity of the compromise was pleaded in bar of the suit and an issue was joined whether it was binding on the plaintiff. We have on record all available evidence on the point. No circumstances have been proved which can raise a suspicion, much less a presumption, that the plaintiff's father did not protect his interests, that the then plaintiff's case was fictitious and that there were no grounds for a compromise. See *Baboo Lekraj Roy* v. *Baboo Mahteb Chand and others*(1), as to the allegations to be made in a plaint like this and as to the burden of proof. I am of opinion that, as no fraud has been established, no ground has been made out for setting aside a decree made by a competent court. I agree in dismissing the appeal with costs.

Appeal dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer, Judge and C. Meenacshaya, Offg. Judge.

1893 *March* 20.

BOPAUNA (PLAINTIFF) *v.* MUNI NARASAPA AND OTHERS (DEFENDANTS).*

Attachment before judgment—Sale in execution pending attachment by another court—Superior court—Code of Civil Procedure (Act XIV of 1882) ss. 274, 276, 285 and 489—Small Cause Courts Act (XI of 1865) s. 20—Court having general jurisdiction—Transfer of decree.

Property was attached before judgment in a suit in the munsiff's

* Appeal No. 103 of 1892, against original decree No. 567 of 1891 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 24th day of November 1891.

(1) 14 Moo. I. A., 394.

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court and while so under attachment it was attached and sold (April 1889) in execution of other decrees against the same defendant in small cause suits instituted in the court of the subordinate judge, who had small cause jurisdiction under Act XI of 1865. No formal order of transfer under s. 20 of the Act was recorded from the small cause to the regular side of the court. Subsequent to this (July 1891) it was brought to sale a second time in pursuance of the attachment before judgment in the munsiff's court, and purchased by the defendants who retained possession of it. They were sued for possession by the purchaser at the previous sale under the small cause court decrees. *Held, Per* CURIAM, (THUMBOO CHETTY, C. J., and MEENACSHAYA, Offg. J, RAMACHENDRA IYER, *dissenting*)—That the first sale under the small cause court decrees was valid and passed the property to the purchaser thereat who was therefore entitled to possession from the purchasers at the second sale, at the date of which the judgment-debtor had no existing interest whatever in the property. No formal order of transfer of the decree from the regular to the small cause side of the sub-judge's court was necessary under s. 20 Act XI of 1865.

Per MEENACSHAYA, Offg. J.—We have to consider whether or not the sale of the 4th April 1889 is valid; if valid, there can be no doubt that in July 1881 when the second sale took place the judgment-debtor had no existing interest whatever in the property.

Section 285 of the Code of Civil Procedure has no bearing whatever on the present case and it is needless to consider whether the sub-judge's court is superior or not to the Munsiff's court. The section simply points out that when claims are preferred and objections raised, the court which is empowered to determine them shall be the court of highest grade. * * *

The only effect of the attachment before judgment is to prohibit private alienations. The legal effect of the sale is to annul the previous attachment before judgment; and the judgment-debtor's interest in the property having been sold in April 1889 nothing remained of it for sale in July 1891. * * *

The subordinate judge has general jurisdiction which is coordinate or concurrent with that of the munsiff and for the purposes of Act XI of 1865, s. 20, there was nothing illegal in his order of attachment and sale of the debtor's immovable property.

Per THUMBOO CHETTY, C. J.—The sub-judge had jurisdiction to attach the immovable property and to bring it to sale in execution of the decree passed on the small cause side of his own court and the mere omission to make a formal transfer of the decree from

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the small cause to the regular side of this court under the provisions of s. 20 of Act XI of 1865 did not render his proceedings invalid. Such transfer is only necessary when the court which passed the decree is purely a court of small causes and has no general jurisdiction to execute the decree both against movable and immovable property * * * . The mere omission to record a formal order of transfer of the decree from the small cause to the regular side of the sub-court does not at all affect the jurisdiction. * * *

The prior attachment before judgment was, under the provisions of s. 489 of the Code of Civil Procedure, no bar to the small cause decree-holder applying for attachment and sale of the property in execution of his decree. The defendants preferred no claim and raised no objection to the attachment and sale of the property under the decree; no question therefore arose for consideration under ss. 285 and 295 of the Code of Civil Procedure.

Per RAMACHENDRA IYER, J.—If a sub-judge transfers to the regular side a decree made by him as a small cause judge (and I think that under s. 20 he ought not to transfer it), he exercises a power which a munsiff can exercise. In other words, the two courts are courts of concurrent jurisdiction and there is no reason for holding that one court is superior to the other. That being so, the argument that a sale ordered by a superior court ought to prevail, rests on no solid foundation. I am of opinion that a person who is bound to apply to a munsiff to execute his decree or to put it more favorably to the plaintiff, who *may* apply to a munsiff to execute his decree, ought not to be permitted to choose a superior court to gain an advantage to himself and to cause loss to a third person. I am of opinion that the plaintiff has not made out a title so as to dispossess the defendants. I would dismiss this appeal with costs.

Mr. *Bhima Row* for the appellant.

Messrs. *Nunjundapa* and *Ramasawmy Chetty* for the respondents.

The following judgments were delivered by the Chief Court:—

RAMACHENDRA IYER, J.—One Chicka Narasapa mortgaged land to defendants Nos. 12 and 13. They filed a suit in 1887 and obtained a decree against the mortgaged property and against the assets of the

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mortgagor. In December 1887, they got an attachment of his property before judgment in another suit, in which they obtained a decree in the munsiff's court for a small sum and on appeal to the chief court a decree for a larger sum. The date of the decree was 1st March 1889. They then applied for sale of the property which had been attached before judgment; and in 1891, made a second application for sale. The property was sold in July 1891, the defendants being the purchasers.

The present plaintiff filed two suits against the said Chicka Narasapa in the small cause court at Bangalore. In execution of his decrees, he got the property in suit sold by the small cause judge who was also a subordinate judge. He purchased the property in April 1889 and sued defendants Nos. 12 and 13 for possession. The munsiff dismissed the suit. The plaintiff has appealed from the decree.

His advocate contends, *firstly*, that the defendants applied for fresh attachment after decree and thereby waived the right secured to them by the attachment before judgment; and *secondly*, that if it is held that the sale was regular and made in pursuance of the first attachment, the plaintiff's sale ought to prevail inasmuch as it was prior in date and was made by a superior court.

The first objection does not seem tenable. I see nothing on the record to warrant the inference that the defendants had waived their right or that they had slept over it. The property was attached in December 1887 and the defendants got a decree for a smaller sum than what they claimed. They ap-

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pealed to the chief court, which passed its decree in March 1889. On the 29th January 1890, they applied for sale of the property under attachment. A claim was made on behalf of the debtor's son which was allowed by the munsiff. The defendants had to appeal once more to the Chief Court and they obtained an order in their favor in December 1890. They made a fresh application in 1891, and they brought the property to sale in July 1891. They did not pray for a fresh attachment; they prayed only for the sale of the property under attachment. Their conduct shows that they were sufficiently diligent in asserting their right and that they did nothing to forfeit the right which they had secured by attaching the debtor's property before judgment.

In support of his second contention, the plaintiff relies on s. 285 of the Code of Civil Procedure. His argument is, that his sale was ordered by the subordinate judge, whose court was superior to that of a munsiff, that if the defendants had any objection to the attachment and sale, they were bound to represent them before that judge, that the property was sold by that judge in 1888, and that it was not liable to be again sold by order of an inferior court.

The right of a decree-holder in a small cause court to bring immovable property to sale is regulated by s. 20 of the Small Cause Courts Act (XI of 1865), which is as follows :—" If after the sale of the movable property of a judgment-debtor, any portion of a judgment-debt shall remain due and the holder of the judgment desire to issue execution upon any immovable property belonging to the judgment-

debtor, the court shall grant him a copy of the judgment and a certificate of any sum remaining due under it; and on the presentation of such copy and certificate to any court of civil judicature having general jurisdiction in the place in which the immovable property of the judgment-debtor is situate, such court shall proceed to enforce such judgment etc.." The expression, "court having general jurisdiction" means the court which is empowered to sell movable and immovable property and it is put in opposition to a small cause court whose power is limited. The expression applies equally to a munsiff's court, a subordinate judge's court and a district judge's court. Does the section mean that a creditor is at liberty to choose any court? I presume that the section does not override the provisions of the Code of Civil Procedure as to the jurisdiction of courts, and that a creditor is bound to apply to that court which would have tried the suit, if there was no court of small causes. As the pecuniary jurisdiction of small cause courts is below Rs. 1,000, I am of opinion that decrees passed by small cause courts ought to be executed by munsiffs, if immovables have to be attached in execution. If a subordinate judge transfers to his regular side a decree made by him as a small cause judge (and I think that, under s. 20, he ought not to transfer it) he exercises a power which a munsiff can exercise. In other words, the two courts are courts of concurrent jurisdiction and there is no reason for holding that one court is superior to the other. That being so, the argument, that a sale ordered by a superior court ought to prevail, rests

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on no solid foundation. It may not be of much practical importance whether a munsiff or a sub-judge directs the sale of immovable property in execution of a small cause decree, if the interests of third persons are not affected thereby. But I am of opinion that a person who is bound to apply to a munsiff to execute his decree or, to put it more favorably to the plaintiff, who *may* apply to a munsiff to execute his decree, ought not to be permitted to choose a superior court to gain an advantage to himself and to cause loss to a third person. I am of opinion that the plaintiff has not made out a title so as to dispossess the defendants. I would dismiss the appeal with costs.

MEENACSHAYA, Offg. J.—I am of opinion that the appeal should be allowed and for the following reasons:—

Defendants Nos. 12 and 13 filed a suit in the munsiff's court against one Chicka Narasapa and attached his property before judgment on the 29th December 1887: a decree was passed in their favor by the munsiff for a smaller sum than was claimed and on the case being carried up in appeal, the Chief Court granted them a larger relief, and this final decree of the Chief Court is dated 1st March 1889. On the 12th June 1891, the judgment creditors, present defendants Nos. 12 and 13, applied for sale of the property attached by them, and on the 16th July 1891 they themselves became the purchasers.

In the meanwhile, that is, after the attachment of the 29th December 1887 at the instance of defendants Nos. 12 and 13 above referred to, the plaintiff obtained two decrees on the small cause

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side of the sub-judge of Bangalore against the same Chicka Narasapa, and in execution attached the same property on the 19th November 1888. He himself became the purchaser on the 4th April 1889, and it appears from the records that he obtained on the 13th November 1889 the sale certificates required by s. 316 of the Code of Civil Procedure.

We have therefore to consider whether or not this sale of the 4th April 1889 is valid; and if valid, there can be no doubt that in July 1891, when the second sale took place at the instance of defendants Nos. 12 and 13, the judgment-debtor, Chicka Narasapa, had no existing interest whatever in the property.

A great deal of argument was addressed to us on the construction of s. 285 of the Code of Civil Procedure, but in my opinion that section has no bearing whatever on the present case and it is needless to consider whether the subordinate judge's court, as far as this case is concerned, is superior or not to the munsiff's court. That section lays down, that "where property not in the custody of any "court has been attached in execution of decrees of "more courts than one, the court which shall re-"ceive or realize such property and shall determine "any claim thereto and any objection to the at-"tachment thereof, shall be the court of highest "grade * * *." Assuming that this section is applicable to attachments of immovable property, about which I entertain doubts which need not be discussed here, it provides for cases where attachments of several courts are taken out and where it is necessary to determine claims thereto and adjudi-

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cate upon objections to the attachment thereof. The section simply points out that, when claims are preferred and objections raised, the court which is empowered to determine them shall be the court of highest grade. The reason for this provision is obvious. If a sub-court and a munsiff's court both attach property belonging to the same judgment-debtor in both the courts, and claims are preferred before both, to avoid any conflict in the decisions of the two courts, a contingency not improbable when each court decides according to its own lights, the legislature has provided that the higher court shall adjudicate upon such claims and objections to secure uniformity and consistency. In the present case, no such claims or objections having been preferred, it is unnecessary to consider which court has the power to determine them.

In deciding the question, whether the plaintiff's purchase, or rather the sale to the plaintiff when there was a subsisting attachment on the property at the instance of defendants Nos. 12 and 13, is valid or not, it is necessary to consider the legal effect of the first attachment by defendants Nos. 12 and 13. Under s. 274, the attachment of immovable property "shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise"; and s. 276 declares that all private alienations of the property attached "shall be void as against all claims enforceable under the attachment." Therefore, the only effect of the attachment order of December 1887 is to prohibit

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Chicka Narasapa from alienating the attached property and to declare all future private alienations by him null and void. When the plaintiff applied for attachment and sale of the property, defendants Nos. 12 and 13 had not even obtained the final decree of the Chief Court in their favor. I fail to see how an order of the munsiff prohibiting Chicka Narasapa from alienating the attached property could be a legal bar to another court ordering the sale or selling the same property in execution of a decree of that court.

In *Kashy Nath Roy Chowdhry* v. *Surbanand Shaha*(1) MITTER and MACPHERSON JJ., held "that "when property is sold in execution of a decree, "it cannot be sold again at the instance of a decree-"holder who had attached it before the attachment "effected by the decree-holder under whose decree it "is actually sold." In that case, two persons held money-decrees against the same debtor. One of them attached his immovable property on the 12th June 1875. While the property was under this attachment, it was sold in execution at the instance of the other judgment-creditor on the 9th July 1875. Subsequently, it was sold again on the 30th April 1876 in pursuance to the attachment put on it on the 12th June 1875.

In my opinion, this is a correct view of the law both under Act VIII of 1859 and the present Code of Civil Procedure, and the legal effect of the sale at the instance of the plaintiff in the case before us, is to annul the previous attachment put upon the property by defendants Nos. 12 and 13. The judgment-

(1) I. L. R. 12 Cal., 317.

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debtor's interest in the property having been sold to the plaintiff in April 1889, nothing remained of it for sale in July 1891.

The decrees on behalf of the plaintiff were decrees of the subordinate judge on the small cause side; he has "general jurisdiction in the place in which the immovable property of the judgment-debtor is situated" as subordinate judge, and I am of opinion that, for the purposes of s. 20 of Act XI of 1865, his general jurisdiction is co-ordinate or concurrent with that of the munsiff, and that there was nothing illegal in his order of attachment and sale of the debtor's immovable property.

I am therefore of opinion that the plaintiff's appeal should succeed with costs.

Thumboo Chetty, C. J.—I concur in the conclusion arrived at by my learned colleague.

Following the ruling of this court, in *Veneatramiah* v. *Goormoorthy*(1) I hold that the sub-judge had jurisdiction to attach the immovable property in dispute and to bring it to sale in execution of the decree passed on the small cause side of his own court, and that the mere omission to make a formal transfer of the decree from the small cause to the regular side of his court, under the provisions of s. 20 of Act XI of 1865, did not render his proceedings invalid. The new Small Cause Courts Act (IX of 1887) has not been extended to Mysore. In ordering the attachment and sale of immovable property, the sub-judge acted not as a court vested with small cause jurisdiction, but as a court of civil judicature having

(1) 8 M. L. R., 288.

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general jurisdiction over the place in which the immovable property is situate. The sub-judge is vested with small cause jurisdiction not under Act XI of 1865 but under the Mysore Civil Courts Regulation I of 1883. The sub-judge's court is not merely a court of small causes, but a court of original jurisdiction with small cause powers up to a certain limit. The formal transfer of a decree from a small cause court to another court, for the purpose of executing a decree against immovable property under s. 20, Act XI of 1865, is necessary only in those cases in which the court which passed the decree is purely a court of small causes constituted under Act XI of 1865, and has no general jurisdiction to execute the decree both against movable and immovable property situate within the limits of its jurisdiction. But where, as in this case, the sub-judge had power to execute the decree not only against the person and movable property of the judgment-debtor but also against any immovable property belonging to him situate within his local jurisdiction the formal transfer of the decree from the small cause to the regular side of his court was unnecessary, much less the transfer of the decree to a munsiff's court. It is only when the decree cannot be executed within the jurisdiction of the court whose decree it is, that it may be sent to another court under s. 223 of the Code of Civil Procedure, or under s. 20 of Act XI of 1865. There is no law in Mysore which takes away the power of a sub-judge to execute his own decrees in small causes against immovable property lying within his local limits, when, after the judgment-creditor has exhausted his remedies against the person and mov-

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able property of the judgment-debtor, he applies for execution against the immovable property of the debtor situate within the local limits of the sub-court. In a very recent case, a divisional bench of this court held that a sub-judge could, acting under s. 20 of Act XI of 1865, order the attachment and sale of immovable property in execution of a decree passed on the small cause side. *Lutchman Row* v. *Abdul Raseed*(1). The mere omission to record, under s. 20 of Act XI of 1865, a formal order of transfer of the decree from the small cause to the regular side of the sub-court does not at all affect the jurisdiction. I am, therefore, of opinion that the sub-judge was in this case quite competent to attach and sell the immovable property in dispute in execution of the small cause decree passed by him.

Now, the question for consideration is, whether the sale ordered by the sub-judge is invalid by reason of the prior attachment before judgment made by defendants Nos.12 and 13. Section 489 of the Code of Civil Procedure is in these terms:—"Attachment before judgment shall not affect the rights existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree."

The attachment of defendants Nos. 12 and 13 before judgment took place on 29th December 1887. They obtained their final decree in the Chief Court on 1st March 1889, but they took no steps to sell the property till 16th July 1891. Long before this date, *i. e.*, on 19th November 1888, the plaintiff got

(1) 2 M. W. N., 91.

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the suit property attached in execution of his decree, brought it to sale on 4th April 1889 and purchased it himself. The prior attachment before judgment made by defendants Nos. 12 and 13 was, under the law quoted above, no bar to the plaintiff applying for attachment and sale of the property in execution of his own decree. Defendants Nos. 12 and 13 preferred no claim and raised no objection to the attachment and sale of the property on account of the decree held by the plaintiff. Therefore, no question arose for consideration under ss. 285 and 295 of the Code of Civil Procedure.

I agree to the appeal being allowed with costs throughout.

Appeal allowed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer, Judge and C. Meenacshaiya, Offg. Judge.

1893 *March* 24.

DASAPA AND ANOTHER, MINORS, BY THEIR GUARDIAN DODA VENKETSAMAPA (DEFENDANTS NOS. 2 AND 3) *v.* M. NUNJUNDIA AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 1).*

Hindu Law—Liability of family property on hypothecation made by father alone—Status of sons—Onus of proof.

A Hindu father hypothecated the family property to secure money advanced to him as a loan for certain contract works on which he was engaged. The creditor sued him and his sons, who were minors, to enforce the hypothecation. *Held per* CURIAM (RAMACHENDRA IYER, J. and MEENACSHAIYA, Offg. J.), following the earlier decisions of the High Courts, that the plaintiff must show the debt was contracted for such purpose as would bind the sons.

Held Per THUMBOO CHETTY, C. J., following the later decisions of the Privy Council, that the sons must make out a case for exempting their shares in the hypothecated property.

Held, on the facts, by the FULL BENCH, that as it appeared the

* Appeal No. 290 of 1891, against original decree No. 961 of 1890 of Mr. B. Ramaswamiengar, Additional Munsiff of Bangalore, dated the 13th day of July 1891.

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debt was contracted for such purposes as would bind the family and there was no proof that it was for an immoral and illegal purpose, the plaintiff was entitled to succeed and the appeal should be dismissed.

Per THUMBOO CHETTY, C. J.—The plaintiff having proved that he had actually advanced the amount mentioned in the plaint-bond and that at or about the time the loan was contracted the father was actually engaged in contract works for which he was in need in money, the onus of proving that the debt was for an immoral or illegal purpose was on the sons. * * * I think the sons have not made out a case for exempting their shares in the hypothecated property and that the whole property is answerable for the plaintiff's debt.

Per RAMACHENDRA IYER, J.—As a father and son have equal rights in the grandfather's property and as it is only in exceptional cases that a father is permitted to sell or mortgage ancestral property without the consent of the co-owners, the decisions of all the High Courts, till about fifteen years ago, were to the effect that a father had, as a rule, power to bind his own share of the family property and that if any one claimed the whole family property by virtue of a mortgage or a sale made by the father alone, he was bound to prove that the alienation was made for a necessary purpose.

The doctrine that an alienation made by a father for a debt contracted by him is binding on a son if he does not prove that the debt was immoral, strikes at the root of the law of co-ownership. A father, who is declared to possess no better or larger right than a son, is practically made absolute owner of the ancestral property; and the right of disposition which the law says a father may exercise in exceptional cases becomes his normal right. By giving prominence to the doctrine of a son's pious obligation to discharge his father's debts, the Privy Council have over-ruled the decisions of all the High Courts, themselves admitting that their decision is "destructive of the principle of independent co-parcenary rights in the sons." * * *

An hypothecation or a sale of family property is binding on sons and grandsons, not because it was made by a father or a grandfather but simply because the necessities of the family justified it and from the circumstances of the case it might be inferred that if the minors had been adults they would have consented to the alienation. In other words a father is only a manager of an undivided family and his power to dispose of his son's interest in the family property is not more extensive than his power to dispose of his nephew's interest. * * *

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The exposition of the law is laid down in West and Buhler's Digest of Hindu Law (pp. 601—651) and is substantially in accordance with the judgment of Justice Muttusami Aiyar in *Pounappa Pillai* v. *Pappuvayyangar*(1). These arguments do not seem to have been examined or refuted and as their Lordships of the Privy Council have plainly admitted that the tendency of their decision in *Nanomi Babuasin* v. *Modhun Mohun*(2) is to destroy the co-parcenary right of sons, which is incompatible with the limited power of disposition conferred upon a father by the Mitakshara, I think we may well follow the earlier decisions of all the High Courts and hold that if a sale or mortgage is made by a father alone and if the vendee sues for possession of the whole family property or if the mortgagee sues for money and prays for the sale of the whole family property, it is his duty to make the sons parties to the suit and to establish as against them, that the alienation was made for the sake of the family and that under the circumstances the father has power to dispose of the whole property.

On the facts, the evidence being sufficient to prove that there was a *bonâ fide* loan and that the father acted as a prudent manager, the appeal must be dismissed.

Per MEENACSHAYA, J.—When a mortgagee from a father alone seeks to enforce the mortgage upon the whole property by making both the father and the sons defendants in the suit, he is expected to show that the debt was contracted for such purposes as would bind the sons also, or, as RAMACHENDRA IYER, J. puts it, that the alienation was made for the sake of the family; and as I find from the record that the debt is proved to be of such a nature I concur in dismissing the appeal.

Messrs. *Ramaswamier* and *Jayaramier* for the appellants.

Mr. *S. Ramaswamiengar* for the respondents.

The following judgments were delivered by the Chief Court:—

THUMBOO CHETTY, C. J.—In this case, I am of opinion, for reasons stated in the appeal (No. 156 of 1892) between the same parties, *Dasapa* v. *Nunjundia*(3) that it is established beyond doubt that the father (defendant No. 1) and his minor sons (defendants Nos.

(1) I.L.R. 4 Mad., 15 to 40. (2) L.R. 13 I.A., 1; *S.C.* I.L.R. 13 Cal., 21.
(3) 16 M. L. R., 123, *infra*.

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2 and 3) were living together at the time the debt was contracted, that the father was the managing member of the family and that the amount mentioned in the plaint-bond was actually advanced to defendant No. 1. Defendant No. 1 admits the debt. It is also admitted that, at or about the time the plaint-bond was executed, defendant No. 1 had some contract work on hand. Defendant No. 1, who is now apparently colluding with his father-in-law and sons, has very reluctantly admitted in his examination that the plaintiff paid the Rs. 200 mentioned in the bond, in which it is stated that the money was borrowed for the purposes of a Park Road contract. Notwithstanding this express recital, defendant No. 1 alleged, in one part of his examination, that the recital was false, that the Park Road work was completed a few months prior to date of the bond and that he had subsequently taken up on contract the construction of Silledar Lines. In another part of his examination, defendant No. 1 stated that he took up the Park Road contract for Rs. 300 or Rs. 400, but when that contract was actually taken or completed, defendant No. 1 would not disclose. Both the Park Road contract and the Silledar Lines were taken up on contract in 1888-89, at or about the time the debts in dispute were borrowed from the plaintiff; and, after a good deal of prevarication, defendant No. 1 was obliged to admit that, of the sums lent to him by the plaintiff, Rs. 200 or Rs. 300 may have been used by him in connection with the Park Road contract or Silledar Lines contract. The Silledar Lines contract was for Rs. 6,000 and more. Defendant No. 1 was ad-

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mittedly in need of money. The only loan that he obtained from his father-in-law was Rs. 500, which was spent wholly for other purposes than the contracts. It is not shown who advanced the monies required for defendant No. 1's contracts. The plaint-bond in this suit recites that the loan was for one of the contracts. It was proved in the other case, that so much as Rs. 500 were advanced for bricks required for the Silledar Lines. The plaintiff's statement, that he lent the monies on the bonds sued upon for the contracts mentioned by defendant No. 1, seems credible.

The plaintiff having proved that he had actually advanced the amount mentioned in the plaint-bond and that, at or about the time the loan was contracted, defendant No. 1 was actually engaged in contract works for which he was in need of money, the onus of proving that the debt was for an immoral or illegal purpose was on defendants Nos. 2 and 3. Beyond the vague exaggerated and incredible statements as to defendant No. 1 having squandered away the family property and his being addicted to drinking and other vices, no specific instances have been adduced to corroborate the vague and general assertions of defendant No. 1 and his witnesses.

The first witness for the defendants on remand, examined in the other suit (No. 798 of 1891), stated that defendant No. 1 had been drinking and keeping dancing girls for two or three years past, whereas the debts were contracted in 1887-88.

The defendants' second witness deposed that he never went with defendant No. 1 and saw him drink.

The plaintiff, who was examined as defendants'

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third witness, denied the statements of the other two witnesses and swore that defendant No. 1 does not drink or keep dancing girls and that what was alleged against him was all false.

Of the three witnesses examined prior to remand on behalf of defendants Nos. 2 and 3, Anjanapa is the person who admitted having received from defendant No. 1 Rs. 500 for the supply of bricks. He does not at all impute any vice to defendant No. 1. The next witness Lakshmi Narnapa was unable to say from what shop defendant No. 1 drank or who was in his keeping. The only other witness who stated that defendant No. 1 used to drink and play cards was Doda Mopu Maistry, and yet he admitted that defendant No. 1 completed the Silledar Lines and was often seen at work there.

The evidence as to defendant No. 1 having led an immoral life is to my mind unworthy of credit. His own allegation, that he spent all the money that he borrowed from the plaintiff in eating and drinking and on his concubine, is not at all credible. As I said before, he is evidently in collusion with his sons to defraud the plaintiff.

I think the sons have not made out a case for exempting their shares in the hypothecated property and that the whole property is answerable for the plaintiff's debt. I would dismiss this appeal with costs.

RAMACHENDRA IYER, J.—This was a suit against defendant No. 1 and his two minor sons for money due upon an instrument of hypothecation executed by defendant No. 1 in August 1887. Defendant No. 1 did not appear and resist the claim. The minor de-

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fendants, through their guardian *ad litem*, pleaded that the debt was not binding upon the family property, inasmuch as it was not contracted for the benefit of the family, and that their father was extravagant and immoral and used to borrow money for vicious purposes.

The Additional Munsiff of Bangalore found that defendant No. 1 was a contractor, that he borrowed of the plaintiff for carrying on his business, that he and his sons were undivided, and that "whether he was viewed as occupying the position of a father or of a manager, his act in mortgaging the suit property for the purpose referred to was binding on the defendants Nos. 2 and 3." He decreed the sale of the mortgaged property if the debt was not paid within three months from the date of the decree.

The sons have appealed from the decree on the grounds that it lay upon the plaintiff to establish affirmatively that there was a necessity for contracting the debt in question, and that the evidence adduced by him was not sufficient to establish legal necessity.

The respondents' advocate referred us to the latest rulings of the several High Courts and of the Privy Council, and contended that it was settled law that a debt contracted by a father was binding upon the sons, if these did not prove that the debt was contracted for an illegal or immoral purpose; that if illegality or immorality was not proved, the sons were under a pious obligation to discharge their father's debt, and that a creditor or a purchaser was not bound to prove that there was a necessity for the loan or the sale.

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I have studied all the latest rulings of the Privy Council and the earlier rulings referred to in them, and I have not found among them a single suit which was instituted by a creditor against a father and his sons for recovery of money by selling the defendants' family property, and I doubt whether those rulings apply to the case before us. As, however, the later judgments insist upon the pious duty of a son to discharge his father's debt, it becomes necessary to examine the point at some length.

A father and a son are declared to possess equal rights in and to be co-owners of, property inherited by the father; and as a consequence of the co-ownership, a son is entitled to demand partition of the grandfather's property against the father's will (*Mitakshara*, c. I, s. 5, vv. 3 and 5). "So likewise the grandson has a right of prohibition, if his unseparated father is making a donation or a sale of effects inherited from the grandfather; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce because he is dependent. Consequently the difference is this: although he have a right by birth in his father's and in his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction, if the father is dissipating the property." (Ss. 9 and 10). A father's right of dis-

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position is defined by verses 27—29 of chap. I, s. 1—"Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father have independent power in *the disposal of effects other than immovables*, for indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth; but he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor." An exception to it follows:—"Even a single individual may conclude a donation, mortgage or sale, of immovable property during a season of distress, for the sake of the family, and especially for pious purposes."

The meaning of the text is this, while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person who is capable may conclude a gift hypothecation or sale, of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties such as the obsequies of the father or the like make it unavoidable.

The law laid down by the author of the *Smrithi Chandrika* is to the same effect. He says:—"It would seem from the above construction that, in the case of the father's property, the ownership of the father and son are unequal, equality of ownership having been specifically ordained in the case of the grandfather's property alone. But this gives rise

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to the question how could there exist such an inequality while one possess a right by birth in both his grandfather's and father's property? The reply however is, that in the case of the grandfather's property the ownership and also independent power (*Swamiyum* and *Swathanthrium*) *are both equal in the father and son.* Whereas in the case of the father's property, while he is alive and free from defect, the father alone possesses *Swathanthrium* and not the son." The rule of law contained in other *Smrithis* is expressed in almost the same terms. See the texts collected by *Shyamachurn Sirkar* in *Vyavastha Chandika*, vol. I, pp. 32—54.

As a father and son are declared to have equal rights in the grandfather's property, and as it is only in exceptional cases that a father is permitted to sell or mortgage ancestral property without the consent of the co-owners, the decisions of all the High Courts, till about fifteen years ago, were to the effect that a father had, as a rule, power to bind his own share of the family property, and that if any one claimed the whole family property by virtue of a mortgage or a sale made by a father alone, he was bound to prove that the alienation was made for a necessary purpose.

The doctrine that an alienation made by a father for a debt contracted by him is binding on a son, if he does not prove that the debt was immoral, strikes at the root of the law of co-ownership. A father, who is declared to possess no better or larger right than a son, is practically made absolute owner of the ancestral property; and the right of disposition which the law says a father may exercise in excep-

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tional cases becomes his normal right. By giving prominence to the doctrine of a son's pious obligation to discharge his father's debts, the Judicial Committee of the Privy Council have over-ruled the decisions of all the High Courts, and one is disappointed that, before they insisted upon a doctrine fraught with such far-reaching consequences, their Lordships did not care to discuss its origin and the limits of its application. They admit that their decision is "destructive of the principle of independent coparcenery rights in the sons." *Nanomi Babuasin* v. *Modhun Mohun*(1). And yet neither in their judgment in *Girdharee Lall* v. *Kantoo Lall*(2), in which prominence was given to the doctrine for the first time, nor in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(3), nor in *Muttayan Chetti* v. *Sangli Vira Pandia Chinnatambiar (Zemindar of Sivagiri)*(4) in which it was confirmed, was an attempt made to examine its foundation or to define its scope.

Yajina Valkya says that "a son need not pay in this world money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll, nor anything idly promised. The father being gone to a foreign country, or deceased, naturally or civilly, or, afflicted with an incurable disease, the sons must pay his debt, but if disputed, it must be proved by witnesses." The author of the *Mitakshara* comments upon this as follows:—" if the father is dead, natu-

(1) L. R. 13 I. A., 1; *S. C.* I. L. R. 13 Cal., 21.
(2) L. R. 1 I. A., 321; *S. C.* 14 B. L. R., 187; 22 W. R., 56.
(3) L. R. 6 I. A., 88; *S. C.* I. L. R. 5 Cal., 148.
(4) L. R. 9 I. A., 128; *S. C.* I. L. R. 6 Mad., 1.

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rally deceased or having become a religious anchorite, or has gone to a distant abode in a foreign country, before having paid the due debts, or if he be afflicted with an incurable disease, the debts contracted by him must be paid by the sons or grandsons, even if he has no property, on account of their being his sons and grandsons. The order of paying is this:—in the absence of the father, the son, and in the absence of the son, the grandson. * * After the death of the father, the son, if he have not yet reached full age, is not bound to pay the debt * * the term *Apprapta Vyavahara* includes also those that are forbidden to proclaim and to summon before a court of law. For a Smriti says—*Apprapta Vyavaharas*, messengers, those that are ready to give alms, ascetics, or those immersed in difficulties, should not be proclaimed to or summoned by the king. Therefore, when the son has reached full age, he should, not caring for his own interest, discharge the debt in such a way that he may not go to hell. * * Though it is said in general that the sons and the grandsons shall discharge the debt of the father, still it should be paid by sons with interest as the father does; the grandson should only pay the principal and not the interest."(1)

It would seem that a son is not under a pious obligation, if the father is not dead naturally or civilly or if an incurable disease does not incapacitate him from managing his affairs; that when the objection arises, if the son or grandson is a minor, he shall not be compelled to discharge the debt, that a grandson

(1) West and Buhler's Dig. Hindu Law, pp. 12, 39 and 40.

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shall not be compelled to pay interest, and that the obligation is laid upon the son or grandson, not that the father may not be punished in a future world, but that he (the son or grandson) may not suffer punishment. This would seem to indicate that the obligation was not one which was enforceable by a secular court. It is clear that the author did not allow the pious objection of a son to interfere with or to override his co-parcenery right, for he says in Chap. I s. 1 v. 29 "while the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person who is capable may conclude a gift, hypothecation or sale of immovable property if a calamity affecting the whole family require it." The author puts minor sons and grandsons on the same footing with minor brothers. An hypothecation or a sale of family property is binding on sons and grandsons, not because it was made by a father or grandfather, but simply because the necessities of the family justified it and from the circumstances of the case it might be inferred that if the minors had been adults they would have consented to the alienation. In other words, a father is only a manager of an undivided family, and his power to dispose of his son's interest in the family property is not more extensive than his power to dispose of his nephew's interest.

If the obligation is enforceable by our courts, we ought not to lay a heavier burden upon a son or a grandson than what is sanctioned by Hindu law. The law lays down minute rules as to the limits of

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interest upon loans of different kinds. These rules having been abrogated, a man being at liberty to contract a debt on any terms, and the court being bound to enforce those terms, it seems doubtful whether we can enforce the pious obligation when the conditions have been altered.

Not only the substantive law but the law of procedure also has been changed by modern legislation. We have already seen that the Hindu law prohibits a suit being brought against a son during his minority. Minority will not avail as a ground of defence in the present day. Again, in regard to the power conferred upon our courts to sell immovable property, the learned authors of West and Buhler's Digest of Hindu Law observe that "Nowhere amongst the provisions of Hindu law for enforcing payment of debts is such a process as the attachment and sale of the lands of a family mentioned. *Jaganatha's* discussion of the subject makes it plain that the connection between an owner and his land was conceived by the Hindu lawyers, as by the earlier Romans, as separable only by his own volition, however that might be influenced. Attachment and sale in execution therefore are entirely the creatures of British legislation" (p. 649).

Justice MUTTUSAMI AIYAR has very elaborately discussed the question in his judgment in *Pounappa Pillai* v. *Pappuvayyangar*(1). This is what that eminent judge states regarding the competency of courts to enforce the pious obligation:—"I desire to be understood as saying that the son's duty to pay his father's personal debt is a legal

(1) I. L. R. 4 Mad., 15—40.

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duty, because it was enforced compulsorily by Hindu kings through their judges, but it must be remembered that these judges exercised an ecclesiastical as well as a secular jurisdiction. It is necessary to separate personal duties enforced by Hindu kings and which rest *wholly* on a spiritual basis from those which, though resting on a religious basis, were enforced as incidents of the right of property. * * * I must observe that the son's duty to pay funeral oblations to a deceased father and the duty to pay his personal debt as a means of relieving him from the effect of his sin in failing to pay it during his life, are not of the same character. The one is the cause of a right and a means of acquiring property, while the other is a burden consequent on a bare filial relation. * * * * *Narada* directs that the son or the grandson shall throw the money into water if the creditor cannot be found; and this shows that the conception underlying this special obligation is spiritual." He observes that the obligation does not arise during the father's lifetime and adds:—"If a suit were brought against the son by reason of this peculiar obligation, and if he was told that the non-payment of a debt was a sin, he might say that the father and the creditor violated the duty which they owed to him and that they ought not to be permitted to gain by their own wrong by appealing to a duty which is to arise after the father's death. In depriving the son of this defence on the strength of the chance of a future uncertain duty and converting it into a coparcenery obligation, the doctrine of relation goes even beyond the antient texts as to the scope of the

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pious duty when it was enforced as a personal legal obligation. After the father's death also, it was open to the son to offer to pay the debt and to set aside the sale by his father, on the ground that it was an act in excess of his authority, and this privilege is also taken away by referring back the pious duty to the date of the sale. Under the antient Hindu law, a divided son lay under this obligation; but it is not suggested that if a father should take it upon himself to sell the share of a divided son, the sale would be valid. Why should not his special duty as son be anticipated to justify the sale as in the case of the divided son?"

There is an exhaustive discussion of the question in West and Buhler's Digest of Hindu Law, at pp. 601—651. "The liability is independent of assets where there are none, and this affords an indication of the kind of debts that can properly be regarded as charges on the estate. *Those only which were excusably incurred are binding.* As the result is substantially the same, it would seem that the father may make such debts a direct charge on the estate after his own death. But for all instruments executed by the father as by others, the general rules hold good which refuse them validity, if made under disturbing influences. None of the texts however which establish this liability nor any of the commentators on them say that a son's liability for his father's debts arises during the father's life. Nor has any response of a shastry been found in favor of such a liability. There are many texts which imply the contrary. * * * The case may be stated even more strongly. There

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is no text imposing on sons a liability during their father's life for debts incurred even for the benefit of the family, except in cases in which the father is not capable of managing the estate and affairs of the family and the sons are. It is impossible that of the numerous texts treating of debts contracted for the family and of the son's liability as survivors of their father, all should have omitted to mention their liability during the father's life had the liability been recognized * * * * . The son's right is a co-ownership entitled to protection against a careless or designing creditor of the father; and there is no hardship in controlling the father's right to sell what he did not buy * * . The law enables him to create burdens for purposes necessary and beneficial to the family, *but not for other purposes, though these should not be immoral* * * * . The authority said to be vested in the father to waste the patrimony, so long as he avoids spending it in the acts included in immorality, makes the position of every Hindu son in a state of union with his father unsafe. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(1) it is said that a son may claim a partition at will. Thus a motive and a means are held forth which tend at least to a complete breakup of the Hindu family system and may lead to very serious consequences".

This exposition of the law is substantially in accordance with the judgment of Justice MUTTUSAMI AIYAR which has already been referred to. As these arguments do not seem to have been examined and refuted, and as their Lordships of the Privy Council have plainly admitted that the tendency of their de-

(1) L. R. 6 I. A., 88; *S. C.* I. L. R. 5 Cal., 148.

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cision is to destroy the co-parcenery right of sons, which is incompatible with the limited power of disposition conferred upon a father by the Mitakshara, I think we may well follow the earlier decisions of all the High Courts and hold that if a sale or a mortgage is made by a father alone and if the vendee sues for possession of the whole family property, or if the mortgagee sues for money and prays for the sale of the whole family property, it is the plaintiff's duty to make the sons parties to the suit, and to establish, as against them, that the alienation was made for the sake of the family and that under the circumstances the father had power to dispose of the whole property.

I advisedly use the words "for the sake of the family" and not "for the family necessity", because a prudent manager of the affairs of a family may have to enter into transactions for which there may be no imperative necessity, which may nevertheless be productive of good to the family, which may meet with the approbation of all reasonable men, and in the propriety of which the members of the family might concur if they were adults. A manager must be invested with a certain amount of discretion and whether, in a particular instance, he has acted within his powers or exceeded the limits of prudence can only be judged by taking all the facts of the case into consideration.

We have now to determine whether the plaintiff has made out a case against the minors. The bond recites that the father borrowed money for certain work which he had contracted to execute. He is a professional contractor and just about the date of

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the loan, he had a contract in hand. The plaintiff deposed that the father showed him an order issued by a Government officer which related to the contract in question and regarding which he trusted the father's statement. It is evident that just at that time, the defendant needed money, for his case is that he and his father-in-law raised a loan on the pledge of his jewels, an allegation not however established by the evidence. There is also some evidence in support of the plaintiff's case that the maternal grandfather and guardian of the minors offered to discharge the debt. On the whole, the evidence being sufficient to prove that there was a *bonâ fide* loan and that the father acted as a prudent manager, the munsiff's decree must be affirmed and the appeal be dismissed with costs.

The guardian, who was well aware of the nature of the transaction, having unnecessarily contested the suit, will be ordered himself to pay the costs incurred by the plaintiff in both courts, under section 440 of the Code of Civil Procedure.

MEENACSHAYA, Offg. J.—As far as the reported cases go, it seems to be settled law that, when a decree is taken against the father on a debt contracted by him alone and when it is sought to be executed on the sons' shares likewise, during the lifetime of the father, the sons can only avoid liability to that decree by proving that the debt was contracted for immoral or illegal purposes. The only available ground, fraud and collusion being of course excepted, upon which the sons could resist execution upon

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their shares is that founded on the immorality or illegality of the debt.

In a case like the present, where both the father and sons are sued on a bond executed by the father alone, it may be contended that the scope of the defence of the sons ought not to be more enlarged than what would be permitted them if they were resisting an execution after decree; and in my opinion such a contention would deserve consideration —a contention whether the sons should have larger rights and wider latitude in a regular suit than in execution proceedings, if the pious duty theory is to be accepted in its entirety: but I do not consider it necessary for the purposes of this appeal to discuss that question. Both my learned colleagues are agreed in this, that when a mortgagee from the father alone seeks to enforce the mortgage upon the whole property by making both the father and sons defendants in the suit, it must be shown that the debt was contracted for such purposes as would bind the sons also, or as RAMACHENDRA IYER, J. puts it, that "the alienation was made for the sake of the family;" and as I find from the records that the debt is proved to be of such a nature, I concur in dismissing this appeal with costs.

Appeal dismissed with costs.

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Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer, Judge and C. Meenacshaya, Offg. Judge.

DASAPA AND ANOTHER, MINORS, BY THEIR GUARDIAN DODA VENKETSAMAPA (DEFENDANTS NOS. 2 AND 3) *v.* M. NUNJUNDIA AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 1).*

1893 *March 24.*

Hindu Law—Joint family—Family debt—Liability of family property—Liability of sons for debt contracted by father alone.

The father, who was manager of a joint Hindu family, was engaged in building contracts which he undertook for the benefit of the family. He had no other employment or means of earning a livelihood for himself and his sons. He borrowed money for the purposes of one of these building contracts and was sued for the debt together with his minor sons by the creditor, who sought to make the whole family property liable. The minors resisted the claim alleging that the father was of immoral and vicious habits and borrowed the money for purposes of immorality. *Held* (THUMBOO CHETTY, C. J. and MEENACSHAYA, Offg. J., RAMACHENDRA IYER, J. *dissenting*) that the debts must be regarded as contracted for the benefit of the family and binding on the sons: and their shares in the suit-property consequently liable for the claim. A family necessity for the debt was proved and the debt was therefore binding on the sons.

Per THUMBOO CHETTY. C. J.—As the present suit is by the creditor against both the father and sons to enforce his right not only against the father's share of the family property but also against the shares of the sons, there must be some *primâ facie* proof that the debts in question were contracted by the manager for such purposes as were binding on the sons also. * * * This is a case in which the father, as head of the family, took up a contract, by the profits of which the family was to be benefited and in which all the members would participate. The father had no employment and no means of earning anything for the support of himself and his sons except by taking up work on contract. That was a business undertaken for the benefit of the family and the father had therefore authority to hypothecate or mortgage the family property for the purpose of completing the contract. The debts must therefore be regarded as contracted for the benefit of the family and binding on the sons. Their shares in the suit-houses are consequently liable for the plaintiff's claim. * * * *

*Appeal No. 156 of 1892, against original decree No. 798 of 1891 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 9th day of March 1892.

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A family necessity for the debt has been proved to exist in this case and the debt is therefore binding on the sons. * * * Whatever may be the character of the father it is proved that the money lent by the plaintiff was required and was apparently utilised for the contract taken up for the benefit of the family of the defendants.

Per MEENACSHAYA, Offg. J.—I am satisfied that the debt was a *bonâ fide* one and contracted for the use of the family. In this view of the case it is unnecessary to discuss the question whether or not it is incumbent on the sons to prove before they can succeed in exempting their shares, that the debt was contracted for immoral or illegal purposes just in the same manner in which they would be required to prove it if they were resisting an execution upon their shares on a decree obtained against their father alone.

Per RAMACHENDRA IYER, J.—As the plaintiff failed to make out a case against the minors, I would, in modification of the munsiff's decree, direct the plaintiff to recover the money from the father's share only and exonerate the minor sons' shares from all liability. The plaintiff to pay the minors' costs throughout.

Mr. *S. Ramaswamier* for the appellants.

Mr. *S. Ramaswamiengar* for the respondents.

The following judgments were delivered by the Chief Court:—

THUMBOO CHETTY, C. J.—The main question for determination in this appeal is, whether defendant No. 1's mortgage of the suit-houses, which are admittedly ancestral property, is binding on his minor sons (defendants Nos. 2 and 3), so as to make their shares in the said property liable for the plaintiff's claim.

There is a conflict of evidence as to whether defendants Nos. 2 and 3 were under the protection of their father, defendant No. 1, at the time the debts sued for were contracted, but the admissions made by the defendants' second witness, Timmiah, and the evidence of the plaintiff's second witness, Raghupathi Sastri, prove that the father and sons and the mother

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of the latter were all living together in one and the same house and that the maternal grandfather and present guardian of defendants Nos. 2 and 3 always lived in a separate house and in a separate village (Dod Ballapur). I am, therefore, disposed to find that defendant No. 1 and his minor sons, defendants Nos. 2 and 3, lived together on the date the debts sued for were contracted and that defendant No. 1 was the managing member of the family.

As the present suit is by the creditor against both the father and sons to enforce his right not only against the father's share of the family property but also against the shares of the sons, there must be some *primâ facie* proof that the debts in question were contracted by the manager for such purposes as were binding on the sons also. The father or manager was for some time employed as sub-overseer in the Public Works Department. He resigned his appointment and took up building contracts to earn the means of maintaining himself and his family. At or about the time the plaint-debts were contracted, he obtained from the Executive Engineer, Palace Division, a contract for the construction of the Silledar Lines at Bangalore. The sanctioned estimate amounted to more than Rs. 6,000 and the brick-work alone was estimated at more than Rs. 1,000. The plaintiff swears that defendant No. 1 borrowed the monies claimed under the plaint-bonds to pay for the bricks required for the completion of the said contract work; and the defendants' third witness, Anjanapa, admits that he obtained an advance of Rs. 500 from defendant No. 1 for the supply of the bricks. The plaintiff has, therefore, satisfactorily prov-

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ed that the debts borrowed from him by defendant No. 1 were borrowed at a time when funds were required to execute the contract work and that almost the whole amount borrowed was advanced for the supply of bricks utilized for the said work. This is a case in which the father, as head of the family, took up a contract, by the profits of which the family was to be benefited and in which all the members would participate. The father had no employment and no means of earning anything for the support of himself and his sons except by taking up work on contract. That was a business undertaken for the benefit of the family, and the father had therefore authority to hypothecate or mortgage the family property for the purpose of completing the contract. The debts must, therefore, be regarded as contracted for the benefit of the family and binding on the sons. Their shares in the suit-houses are consequently liable for the plaintiff's claim.

There is no doubt a distinction between a case in which a decree has been obtained against the father and family property has been sold and the sons afterwards seek to recover their shares in the property, and a case in which a creditor seeks to enforce his claim against the family property in a suit in which both the father, who mortgaged the property, and the sons, who were no parties to the mortgage, are jointly sued.

In the first case, the sons, as has been repeatedly held, can only succeed in securing their shares, if it is clearly made out that the debt was the result of fraud or immorality. The reason is, that the father, as the representative of the minors or other mem-

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bers of the family, is presumed to have acted fairly and honestly and for the benefit of the family. His act was not questioned before the decree was passed and after decree the debt was chargeable to the whole estate. *Narayanrav Damodar* v. *Javhervahu*(1).

In the second case, where the sons are made parties to the suit of the creditor, they have every right to insist upon the creditor, who obtained the bond only from the father, proving that there was a family necessity for the debt and that the sons were bound by it. Such necessity has been proved to exist in this case and the debt is, therefore, binding on the sons.

Defendants Nos. 2 and 3 tried to show that their father was leading an immoral life and that he was a drunkard. The evidence on this point is, to my mind, not quite worthy of credit. The witnesses have apparently exaggerated facts. A perusal of defendant No. 1's evidence and that of his father-in-law shows that they are now colluding together to defraud the plaintiff. Defendant No. 1 would make it appear that he had spent all the monies he had borrowed from the plaintiff from time to time in eating and drinking. If he was leading such a vicious life and was a notorious drunkard, he would not have succeeded in obtaining such a large contract as the one referred to above. Whatever may be the character of defendant No. 1, it is proved in this case that the money lent by the plaintiff was required and was apparently utilised for the con-

(1) I. L. R. 12 Bom., 431.

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tract taken up for the benefit of the family of the defendants.

I would, therefore, uphold the munsiff's decree and dismiss this appeal with costs.

Since writing the above, the case was argued before a Full Bench. The advocate for the minor sons relied upon the decision of the Allahabad High Court in *Jamna* v. *Nain Sukh*(1). The advocate for the plaintiff argued that that decision was dissented from in *Chintamanrav Mahendale* v. *Kashinath*(2) and quoted the decision in *Bhagbut Pershad* v. *Girja Koer*(3) and *Beni Madho* v. *Basdeo Patak*(4) as supporting his contention, that the sons of defendant No. 1 in this case cannot succeed in having their shares in the mortgaged property exempted from liability for the debt sued for, unless it was proved that the debt was contracted for an immoral or illegal purpose and it was, therefore, a debt which, according to Hindu law, the sons of a Hindu would not be under a pious obligation to discharge. *See* also *Bhawani Baksh* v. *Ram Dai*(5) and *Pem Singh* v. *Partab Singh*(6). In a recent decision of the Madras High Court, *Natasayyan* v. *Ponnusami Nadan*(7), it was held that, even during the father's life-time, it is the pious duty of the sons to discharge the debts of their father unless contracted for illegal or immoral purposes. In this case, defendant No. 1 admits that the debt is justly due to the plaintiff. The evidence as to

(1) I. L. R. 9 All., 493. (2) I. L. R. 14 Bom., 320.
(3) I. L. R. 15 Cal., 717. (4) I. L. R. 12 All., 99.
(5) I. L. R. 13 All., 216. (6) I. L. R. 14 All., 179.
(7) III Madras Law Journal Reports, 1.

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defendant No. 1's immoral habits is too general and, to my mind, incredible. There is absolutely no evidence to connect the debt with the father's alleged immoralities, or to show that the plaintiff knew that defendant No.1 was of bad character and that he contracted the loans to meet his immoral demands. I would, therefore, hold the whole property mortgaged liable for the plaintiff's claim.

RAMACHENDRA IYER, J.—As I have discussed the question of law in *Dasapa* v. *Nunjundia*(1), it only remains for me to determine whether the evidence here is sufficient to establish the plaintiff's case.

The bonds do not recite the purpose for which the loans were needed. If the money was needed for the work taken on contract, there is no explanation why the purpose was not mentioned as was done in the bond filed in the other suit. The plaintiff did not prove that he made any enquiry regarding the purpose or what reason he had to satisfy himself that money was needed by the father for the sake of the family. The bond executed in February 1888 recites that a part of the consideration was paid in October 1887. If there was a loan given in October, one would suppose that this would have been added on to the debt for which a bond was executed in November 1877. As the plaintiff failed to make out a case against the minors, I would, in modification of the munsiff's decree, direct the plaintiff to recover the money from defendant No. 1's share only and exonerate the minors' shares from all liability. The plaintiff to pay the minors' costs throughout.

(1) 16 M. L. R., 103, *ante*.

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MEENACSHAYA, Offg. J.—I was at first inclined to think that it was not proved in this case that the debt was a *bonâ fide* one and contracted for the use of the family, but on a careful consideration of the records, I concur with the learned Chief Judge in thinking that the plaintiff is entitled to succeed against the minor defendants also.

The evidence adduced for the defendants as regards the immoral and wicked habits of defendant No. 1 is so monstrously exaggerated and extravagant that I attach no value whatever to it. Defendant No. 1 himself is playing most barefacedly into the hands of the other defendants. That defendant No. 1 took up building contracts about the time the debts in this suit were contracted is abundantly proved, also that the contracts were for large sums of money. Defendants' third witness swears that he supplied the bricks to defendant No. 1 to the value of Rs. 1,000, which itself shows the buildings to have been of considerable value in regard to the other materials and labor. It is not shown that he had other available funds, or that he borrowed from other sources. I do not attach much value to the omission to mention in bonds *A* and *B* the purpose for which the monies were borrowed. No doubt in the bond, which was the subject-matter of the other appeal(1), mention is made that the money was for a particular contract work, and if the object of the plaintiff, in inserting that, was to give the debt the appearance of a family debt, it is not apparent why he omitted any such mention in the

(1) 16 M. L. R., 103, ante.

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present suit-bonds, especially as defendant No. 1, if the evidence of the other defendants is to be believed, would have been accommodating enough to consent to anything being written in the bonds, provided only he could get money to feed his vicious habits. I am inclined to think that the plaintiff *bonâ fide* believed defendant No. 1 required these several sums of money for his building contracts, and did not attach any special significance to the mention or otherwise of the purpose of such loan in the bond. Defendants' second witness states that the contract for the Silledar Lines was for three or four thousand rupees, that monies were necessary for the business, and that defendant No. 1 had no money for the purpose.

Defendant No. 1 says "I gave four, five or six bonds to the plaintiff. * * * I gave the bonds sued on. I drew money as I wanted." It is true he denies having received any money on bonds *A* and *B*, but in cross-examination he says—"*C* and *C1* are signed by me. I borrowed Rs. 200 before these dates, four or five months before." *B* is for Rs. 200 and dated 21st February 1888. *C* is dated 18th June 1888 and the Rs. 200 which he admits having borrowed must have been the Rs. 200 of bond *B*. *C1* is for Rs. 550 and made up largely of several sundry small sums previously borrowed. I conclude from all this that defendant No. 1 borrowed from the plaintiff money as he required it for his building contracts and executed these bonds. Sometimes small sums were borrowed and afterwards totalled and consolidated as in bond *C1* and this accounts for bond *B* comprising a

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previously advanced item of Rs. 100. On the whole, I am satisfied that the debt was a *bonâ fide* one and contracted for the use of defendant No. 1's family.

In this view of the case, I consider it unnecessary in this appeal also to discuss the question, whether or not it is incumbent upon defendants Nos. 2 and 3 to prove, before they can succeed in exempting their shares, that the debt was contracted for immoral or illegal purposes just in the same manner in which they would be required to prove it if they were resisting an execution upon their shares on a decree obtained against their father alone.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Before A. Ramachendra Iyer, Judge and C. Meenacshaya, Offg. Judge.

1893 *April* 8.

DODA THAMA (DEFENDANT No. 2) *v.* MANGIA OODOOPA AND OTHERS, MINORS, BY THEIR GUARDIAN BASKER JOIS (PLAINTIFFS).*

Hindu Law—Joint Family—Liability of family property—Execution purchaser—Liability of a member not party to the decree—Onus of proof.

A purchaser from an auction purchaser at a sale held in execution of a decree against several members of a joint Hindu family sued for possession of the family property and was resisted by one member who was not party to the decree, those against whom it had passed being his distant cousins only, though one of them was alleged to have been manager of the family. *Held,* that although a manager or one member only of a Hindu family may under certain circumstances make a valid sale or mortgage of the joint family property without the concurrence of the other members, it lies upon the purchaser or mortgagee to establish the validity of the alienation. *Also,* a decree is not conclusive against nephews, brothers or cousins of the judgment-debtor, and a purchaser in execution must prove that the debt or alienation in question bound the

* Appeal No. 312 of 1892, against original decree No. 38 of 1890 of Mr. C. Cress, District Judge of Nagar, dated the 21st day of July 1892.

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other members who had not been made parties. A decree may be taken only as some evidence of the binding character of the debt.

Mr. *D. Vencataramia* for the appellant.

Mr. *S. Narayana Rao* for the respondents.

The Judgment of the Chief Court (RAMACHENDRA IYER, J. and MEENACSHAYA, Offg. Judge) was as follows:—

The plaintiff sued for possession of property which he purchased from one who had purchased it in execution of a decree obtained against six members of the defendants' family. The second defendant resisted the claim alleging that he was no party to the former decree and that his share of the property did not pass to the purchaser. The District Judge of Shimoga was of opinion that this defendant was bound by the decree and by the sale made in pursuance thereof, since he failed to prove that the debt had been contracted for an immoral or illegal purpose. The defendant has appealed from the decree.

The evidence of defendant No. 2, which was believed by the district judge, shows that neither he nor his father was a party to the decree, and that the members of the family who were parties to it were related to the defendant as distant cousins. One of them was alleged to have been manager of the affairs of the family. A manager or any member of a Hindu family may, under certain circumstances, make a valid sale or mortgage of the joint family property without the concurrence of the other members. But then, it is upon the mortgagee or the purchaser to establish the validity of the

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alienation in question. If the special circumstances are not proved, the purchaser cannot claim more than the share of the alienor.

A man is said to have power to convey his son's share also when there is no actual necessity shown; but this is put upon the special ground of a son's obligation to pay his father's debts. This question need not be considered, as it does not arise in this case.

There is no judgment which supports the finding of the district judge, that an auction-purchaser in execution of a decree obtained against some members of a Hindu family can, as a matter of course, claim possession of the whole property. All the decisions which we have referred to proceed to this extent only; that if all or most of the adult members of a Hindu family are sued and a decree is obtained against them, it may be taken as some evidence of the binding character of the debt; that the decree is not conclusive against the nephews or brothers or cousins of the judgment-debtors; and that a purchaser in execution of the decree must prove that the debt or alienation in question bound the other members who had not been made parties to the former decree. As the suit was not properly investigated, we reverse the decree and direct the judge to restore the suit to his file and to dispose of it on the merits. The costs of this appeal will be costs in the cause and will abide the result.

Appeal allowed. Case remanded for trial on merits.

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Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

KONARAPA (PLAINTIFF) v. CHIKAVEERAPA (DEFENDANT No. 4).* 1893 *May* 30.

Document—Attestation—Liability of attesting witness.

The mere fact that a man attests a document does not prove that he consents to its contents or even is aware of them; nor is the act of attestation in itself any proof of acquiescence or ratification.

Mr. *D. Venkataramia* for the appellant.

Mr. *A. Sambasivia* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

The only question for decision in this appeal is, whether defendant No. 4 or his share of the hypothecated property is liable for the plaintiff's claim.

It is said that the loan secured by the plaint-bond was obtained to defray the expenses of marriages of both defendants Nos. 1 and 4. So far as defendant No. 1 is concerned, he is a party to the bond. If, as alleged by the plaintiff, a portion of the loan was appropriated for meeting the expenses of the marriage of defendant No. 4 and if the latter was also present when the plaint-bond A was executed, why was not defendant No. 4, like defendant No. 1, made a party to the bond? There is no account to show what amount was spent for the marriage of defendant No. 4, or who defrayed the marriage expenses. From the mere fact that defendant No. 4's elder brother Rudrappa was present at and celebrated the marriage, it cannot be presumed that he defrayed the expenses of marriage.

* Appeal No. 339 of 1892, against original decree No. 853 of 1891 of Mr. B. S. Krishnaswamiengar, Munsiff of Chickballapur, dated the 30th day of July 1892.

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It was argued that defendant No. 4 attested the bond A. He denies his attestation, though the witnesses to the bond speak to his having attested it. There is no evidence to show that the bond was read out and its contents made known to the attesting witnesses; and, following the ruling of this Court in *Dassa Pundit* v. *Rudrappa and others*(1), we hold that the fact that a man attests a document does not prove that he consents to its contents or even is aware of them, nor is the act of attestation in itself any proof of acquiescence or ratification.

We agree with the munsiff that neither defendant No. 4 nor his share of the hypothecated property is answerable for the plaintiff's claim.

We dismiss this appeal with costs.

Appeal dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 *June* 12

RAMASWAMY CHETTY (DEFENDANT) *v.* CHEPALY KRISHNIA (PLAINTIFF).*

Res judicata—Cause of action—Defence raised for the first time in appeal.

By a razinama decree the defendant was given the option of raising the level of his yard so as to allow his house-water to flow freely through a certain drain provided he did not thereby injure the tenements of the plaintiff and co-defendants and the latter on their part were not to prevent the plaintiff and defendant from cleansing the drain. Subsequently the defendant, who did not exercise the option so given him of raising the level of his yard, allowed the drain to be choked and become a nuisance to the plaintiff who sued for abatement of such nuisance. The defendant in

* Appeal No. 368 of 1892, against original decree No. 520 of 1892 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 11th day of October 1892.

(1) 3 M. L. R., 89.

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appeal raised the plea of *res judicata* on the previous razinama decree. *Held* by the Chief Court, but on differing grounds, that the plea was bad and the defendant's appeal should stand dismissed.

Per THUMBOO CHETTY, C. J.—Subsequent to the razinama decree, which left it optional with the defendant to raise the level, there has been an accumulation of sewage and dirty water, causing nuisance, inconvenience and ill-health to the plaintiff and the inmates of his house, so as to entitle the plaintiff to litigate the matter again and get a peremptory order directing the defendant to do the deedful to remove the nuisance and obstruction complained of in the plaint. In this view, the former decree is no bar to the present suit.

Per KRISHNA MURTI, J.—In the munsiff's court the defendant allowed the case to be dealt with *ex parte*. There was no defence and the bar of the previous decree was not pleaded. * * It is, in my opinion, too late in the day for the appellant to take his objection for the first time in this court and ask to be heard on the plea of bar by means of a previous decree, which document does not seem to have been even exhibited in the lower court.

Mr. *Nunjundapa* for the appellant.

Mr. *S. Ramaswamiengar* for the respondent.

The following Judgments were delivered by the Chief Court :—

THUMBOO CHETTY, C. J.—The main question for decision in this appeal is, whether the decision in the former suit, No. 533 of 1890, is a bar to the present suit.

The cause of action, as alleged in the plaint filed in No. 533, was the wrongful act of Papachama and her son Muniswami (defendants Nos. 1 and 2 in that suit) in having built an under-ground drain on site marked *A B* in the plan and thereby obstructed the flow of water from the plaintiff's backyard and that of the present defendant Ramaswamy Chetty (who was defendant No. 3 in the former suit). There was a razinama decree, dated 13th December 1890, to the effect that defendant No. 3

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(the present defendant) might raise the level of his own back-yard and let his house-water flow freely through drain *A B*, provided that, in doing so, defendant No. 3 should not cause any injury to the house of defendants Nos. 1 and 2. It was added that, if the drain *A B* got choked up and the flow of water through it became obstructed, the plaintiff and defendant No. 3 should cleanse the drain without any injury to the house and walls of defendants Nos. 1 and 2, who, in their turn, should not prevent the plaintiff and defendant No. 3 from cleansing the drain.

It will thus be seen that that decree was for the benefit of both the plaintiff and defendant No. 3. The decree did not peremptorily direct defendant No. 3 to raise the level; it was left optional with him to do so, if he considered it necessary for the purpose of letting off his house-water through *A B*.

Now, the cause of action alleged against the present defendant, though connected with the drain *A B* and his not having raised the level of his house so as to cause the free flow of water through *A B* into the public drain, is distinct and such as gives the plaintiff the right to litigate the matter again. This is what is stated in the present plaint:—"The defendant having failed to fulfil the conditions of the razinama, water from the plaintiff's and the defendant's back-yard cannot freely flow through the drain *A B*; consequently, the eastern and northern walls of the plaintiff's house have become damp and the house has become unfit for occupation; and as sewage water stagnates in the plaintiff's and the defendant's back-yard, it has become a source of nuisance and sick-

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ness to the inmates of the plaintiff's house. The plaintiff often requested the defendant to raise, in accordance with the razinama, the level of the defendant's back-yard to be in keeping with the level of the drain *A B*, and to have the drain re-built so that water may flow freely out, and the plaintiff also gave a written notice to the defendant who failed to comply with it. Cause of action arose on the 21st October 1891."

It will be seen from the above plaint that, subsequent to the razinama decree, which left it optional with the defendant to raise the level, there has been accumulation of sewage and dirty water, causing nuisance, inconvenience and ill-health to the plaintiff and the inmates of his house, so as to entitle the plaintiff to litigate the matter again and to get a peremptory order, directing the defendant to do the needful to remove the nuisance and obstruction complained of in the plaint. In this view, the former decree is no bar to the present suit. The munsiff's decree must be affirmed and this appeal dismissed with costs.

KRISHNA MURTI, J.—After carefully considering the case, I have also come to the conclusion that this appeal ought not to be allowed.

I do not feel called upon to say how the munsiff would have decided, if all the materials which are now before us had been placed before him. But, in that court, the defendant allowed the case to be dealt with *ex parte*. There was in fact no defence and the bar of the previous decree was not pleaded. In his examination before the munsiff, the plaintiff positively swore that "there was no decree according to

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razinama" and that therefore he had "to sue on the basis of the razinama." The munsiff put faith in this statement and passed his decree. It is in my opinion too late in the day for the appellant to take his objection for the first time in this court and ask to be heard on the plea of bar by means of a previous decree, which document does not seem to have been even exhibited in the lower court. I agree to this appeal being dismissed with costs.

Appeal dismissed with costs.

Before A. Ramachendra Iyer, Offg. Chief Judge and P. N. Krishna Murti, Judge.

1893 *October* 2.

KADARAPA (DEFENDANT No. 1) *v.* KADARAKA (PLAINTIFF).*

Evidence—Transfers of patta—Payment of kundayem—Village accounts.

In a suit for the recovery of land the plaintiff relied on the fact that the land was first registered in the name of the plaintiff's father-in-law and then successively transferred to the names of her husband and herself as being inconsistent with the theory of the defence that the real pattadar was only a dependent of the defendants' family; the plaintiff also relied upon entries in certain village accounts as showing regular payment of kundayem by the plaintiff's family and that the family resided in a house separate from that of the defendants and managed its own affairs. *Held,* that these conclusions were not incorrect, but that the production of the village accounts did not dispense with the necessity of examining witnesses who made the entries, if they were forthcoming. As corroborative evidence such entries are always entitled to great weight, but independently they might often be erroneous and lead to incorrect conclusions if the precaution of examining their authors be not adopted.

The suit was for the recovery of land which the plaintiff claimed to belong to her and in regard to

* Appeal No. 81 of 1893, against original decree No. 301 of 1892, of Mr. B. S. Krishnaswamiengar, Munsiff of Chickballapur, dated the 23rd day of December 1892.

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which she alleged the defendants denied her right and obstructed her enjoyment asserting it to be their own property. She asked for a declaration and injunction.

The following extracts from the Munsiff's judgment show what the contention of the parties was—

The plaintiff's case is that the land sued for originally belonged to one Imam Saib and that her husband's father Ajjaga acquired it from Imam Saib more than twenty years ago. It is said that the land was since then in Ajjaga's enjoyment until his death. After Ajjaga's death the land passed to his son Pedaga, the plaintiff's late husband. Since Pedaga's death the land has been in the plaintiff's enjoyment.

The defendants contend that the land never belonged to Ajjaga and Pedaga and that it has been in the defendants' enjoyment from Lagayet. The defendants say that Ajjaga and Pedaga and the plaintiff had no house of their own but that they were dependents of the defendants' family; and that they were living in the defendants' house. This latter contention appears to be untrue from the kanashumari accounts produced by the plaintiff. In the kanashumari account of Magaladapi, the village in which the parties live, for the year 1890, House No. 1 is noted as Kadirapa bin Nanjana's; this is defendant No. 1. House No. 5 is Kadiraka kom Pedana's; this is the plaintiff. This shows that the plaintiff was living in a separate house. In the remarks column the occupation of the house-owners is stated. Kadiraka (the plaintiff) is stated to be a cultivator. This falsifies the defendants' assertion that neither the plaintiff nor her husband ever cultivated land independently. The kanashumari accounts for 1889 and 1891 prove the same facts. Those for 1882 show House No. 1 as Nanja bin Kadiriga's; this is the father of the defendants. House No. 5 is Pedaga bin Ajjaga's; this is the plaintiff's husband.

The defendants' pleader contended that these kanashumari accounts should not be relied upon as they were all prepared by shanbogs who bore ill-feeling towards the defendants. There is not a particle of evidence to bear out this contention. The defendants might have called the officials who prepared these accounts, and shown that the entries contained in them are not facts or they might have proved that the plaintiff's and her husband's separate residence in a separate house was not inconsistent

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with their allegation that both the husband and the wife were their dependents.

The defendants asserted that neither the plaintiff nor her husband nor Ajjaga ever had any land of their own and never enjoyed any land in their own right. Defendant No. 1 admitted in his evidence that the patta of the land in question was in Ajjaga's name until his death, that after Ajjaga's death the patta was transferred to Pedaga's name and after Pedaga's death to the plaintiff's name. If the land did not belong to Ajjaga and Pedaga and to the plaintiff, why has the patta been regularly passing from the name of Ajjaga to that of Pedaga and then to that of the plaintiff.

It is true that the mere existence of the patta in one's name does not prove one's title to the land comprised under it. But from the consecutive transfers of the patta in this case the fair presumption arises that the land belonged to the plaintiff's family.

The kundayem-vasooli book for the year 1871 relating to the village of Magaladapi shows that Imam Saib, to whom the land originally belonged according to the plaintiff, paid the kundayem of the land in that year. From the smornodaya-vasooli book for 1873 it appears that Ajjaga separately paid kundayem. The khatay account books for 1881 show that Pedaga bin Ajjaga paid kundayem on the land in question for that year: and that the father of defendant No. 1 paid kundayem separately for his patta lands in the same year. Similarly the khatay account book for 1888 shows that the plaintiff paid kundayem on the land in suit for that year and then there is the receipt-book issued to the plaintiff in respect of the kundayem of the land in suit, which, with all the other documents, goes a great way to establish that the plaintiff Pedaga and Ajjaga possessed an interest in the land.

The pani accounts also support the plaintiff's statement and contradict that of the defendants as to the crops raised on the land in suit during various years.

On the whole I think the plaintiff has made out a much stronger case than the defendants and I therefore decree in her favour as prayed.

Against this decree of the Munsiff, defendant No. 1 appealed to the Chief Court.

Mr. *L. Srinivasiengar* for the appellant.

Mr. *Nunjundapa* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA

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IYER, Offg. C. J. and KRISHNA MURTI, J.) was as follows:— 1893

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After perusing the records of the case and hearing Mr. Srinivasiengar for the appellant, the impression produced on our minds was, that the munsiff's judgment was correct and ought to be upheld.

The fact that the land was first registered in the name of the plaintiff's father-in-law and then successively transferred to the names of her husband and herself is quite inconsistent with the theory set up by the defence, that the real pattadar was only a dependent of the defendants' family. At various intervals the entries in the village accounts shew that the kandayem was paid by the pattadars themselves. The plaintiff's family seems also to have resided separately in a separate house and managed its own affairs.

The conclusion of the munsiff based upon the village accounts is not incorrect. But we think it necessary to point out that the village accounts do not seem to dispense with the necessity of examining witnesses who made the entries, if they are forthcoming. As corroborative evidence such entries are always entitled to great weight, but independently they may often be erroneous and lead to incorrect conclusions, if the precaution of examining their authors is not wisely adopted. While the law lays down rules for the admissibility of evidence, it is the judge who ought not to neglect the facilities which are available to him of properly and correctly appreciating such evidence and it is in furtherance of this duty of judges that we want to impress upon our

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courts the desirability of seeking information at its fountain source and sifting it in all the ways authorised by law.

In addition to the accounts relied upon by the munsiff, there is also oral evidence to shew how the plaintiff's father-in-law acquired this land. An old sheikdar seems to have given it to him as his (sheikdar's) pony was taken care of by him.

On the whole, we agree with the munsiff in his decree and dismiss this appeal with costs.

Appeal dismissed with costs.

Before A. Ramachendra Iyer, Offg. Chief Judge and P. N. Krishna Murti, Judge.

1893 October 11.

GURU BASAPA AND OTHERS (DEFENDANTS NOS. 4, 5 AND 6) *v.* ADI MURTIAPA AND ANOTHER (PLAINTIFFS).*

Hindu Law—Divided family—Adoption—Evidence.

Defendants Nos. 1, 2 and 3 sold a shop and house to the plaintiff representing that it had fallen to the share of *N* on division with his brothers some fifty years previously and that defendant No. 1 was the adopted son of the said *N*. Defendant No.2 was own brother to defendant No. 1, they being sons of *D* the brother of *N* by his first wife while defendants Nos. 4, 5 and 6 were his sons by a second wife. Defendant No. 3 was son of defendant No. 2 and defendant No.7 was lessee from defendant No. 2 and alleged to have collusively let defendants No. 4, 5 and 6 into possession of the property in dispute. Besides the partition between *N*, *D* and other brothers fifty years ago, it was alleged that there had been also a division, thirty-eight years before suit, between *D* and his sons These latter (defendants Nos. 4, 5, and 6) claimed to share in the property. *Held*, that the facts of defendant No. 1 being brought up by *N* and subsequently to his death by his divided brother, *G* and that all *N's* property came to and was in the possession of defendant No. 1 supported the conclusion that defendant No. 1 was adopted by *N*.

* Appeal No. 119 of 1893, against original decree No. 660 of 1892 of Mr. A. Ananda Rao, Munsiff of Tumkur, dated the 13th day of April 1893.

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Also, the facts that the shop was mortgaged by *N*; was redeemed and subsequently mortgaged by the latter's divided brother *G*, who acted as guardian after the death of *N* to defendant No. 1 and that it was redeemed again by defendants Nos. 1 and 2 and let by them to defendant No. 7, were facts which went to show that the shop was not the property of the father of defendants Nos. 4, 5 and 6.

The facts of the case appear from the judgment of the Munsiff, which was as follows:—

Plaintiffs file this suit for the recovery of a shop building sold by defendants Nos. 1, 2 and 3 under a duly registered deed dated 2nd May 1891, or for the recovery of the purchase money paid by them with interest thereon from the vendors, if the court should hold that the vendors had no title to convey the property to them.

Defendants Nos. 4, 5 and 6, the step-brothers of defendants Nos. 1 and 2, resist the plaintiffs' claim and state that the suit property belonged to their father Doda Chenabasana, that they and defendants Nos. 1 and 2 are yet undivided in interest and that they also have a share therein.

The allegations made in the plaint that the suit property belonged to Nanjundapa and that his adopted son defendant No. 1 inherited it from his father and that all along the suit shop was in defendant No. 1's adopted father's and afterwards in his guardian's possession, are also denied by defendants Nos. 4 to 6.

Defendant No. 3 is the son of defendant No. 2, while defendant No. 7 is a stranger to the others, but has been impleaded, because the shop which had been leased to him by defendant No. 2 was made over by him to defendants Nos. 4, 5 and 6 in collusion with them.

There were four brothers, *viz.*, Doda Chenabasana, Nanjundapa, Gubana and Guru Chenabasapa.

Nanjundapa had no male issue. Doda Chenabasana had married two wives, defendants Nos. 1 and 2 being his sons by the first wife while defendants Nos. 4, 5 and 6 are the sons by the second wife.

Nanjundapa is alleged to have taken defendant No. 1 in adoption some thirty-five years ago. Being issueless there is every reason to believe that he adopted a son. He could not have selected a more suitable person for adoption than defendant No. 1 (who had just become motherless) the son of his brother.

The eighth and ninth witnesses have deposed to the fact of defendant No. 1 having been adopted by Nanjundapa. The eighth witness is related to the defendants, *i. e.*, he is the uncle (mother's

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brother) of defendants Nos. 1 and 2, and as such he would have been necessarily present at such an important event as the adoption. Mariana also states that he was present at the adoption of defendant No. 1. He is a respectable looking old man of about sixty years.

The pleader for defendants Nos. 4 and 6 has animadverted upon the testimony of these, because of the contradictions in their testimony. One stated that the feeding took place in the noon and the other in the night. This is a contradiction on which great stress is laid. Considering the time which elapsed since then, nearly thirty-five years, I do not think this contradiction is such as would justify my discrediting the testimony of the witnesses as false. No other reasons are alleged against them for disbelieving their testimony. This evidence coupled with the important admissions made by defendant No. 4 and his mother Nanjama (the defence fourth witness) leaves no doubt whatever that the adoption of defendant No. 1 is a fact.

Defendant No. 4 who was examined as defence first witness admits that defendant No. 1 is occupying the house in which Nanjundapa was living. He admits the execution of exhibit *A* in which the northern boundary of the property he conveyed thereby is described as "ನಮ್ಮ ಅಣ್ಣನಾದ ಸಿದ್ದಪ್ಪನವರ ಅಂಗಡಿ ಇವರ ಪಾಲಿಗೆ ಬಂದಿರುವ ಬಾಬತ್ತು," the shop which has fallen to his brother Sidapa's share.

The fourth witness Nanjama, mother of defendants Nos. 4, 5 and 6, admits that the house and fields enjoyed by Nanjundapa, her husband's brother, are being now enjoyed by defendant No. 1. She states that defendant No. 1 was reared by Nanjundapa although she attributes this to defendant No. 1 having lost his mother. She further supports defendant No. 1's statement that after Nanjundapa's death, his brother, Guru Chenabasapa, took under his protection the former's two daughters and defendant No. 1.

The fifth witness, Sidapa, held a mortgage of the suit-shop and was in possession thereof for twenty years, under *Ex. E.* He deposes that the shop had been mortgaged to one Basavana by Nanjundapa, to whom it belongs, and that to redeem this mortgage, Guru Chenabasapa mortgaged it to him (witness). He states that defendants Nos. 1 and 2 both paid him the money and redeemed the mortgage. Guru Chenabasapa's mortgaging the property to pay off the debt due to Basavana by Nanjundapa is perfectly consistent with Nanjama's statement that Guru Chenabasapa was a guardian of Nanjundapa's children.

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The mutation of names in the Revenue registers in favor of defendant No. 1 after Nanjundapa's death (vide *Exs. I* and *II*) and Shanbog Vencatramia's evidence also confirm the truth of defendant No. 1's adoption by Nanjundapa.

I therefore find on the second and third issues that the suit-shop was in Nanjundapa's possession and after his death in Guru Chenabasapa's possession *quâ* defendant No. 1's guardian, and that defendant No. 1 is yejaman Nanjundapa's adopted son.

With regard to the first issue the admission made by defendants 4 and 5 and by their mother Nanjama are enough to hold that the four brothers Nanjundapa, Gubiana, Guru Chenabasapa and Doda Chenabasapa were living divided in interest and that the suit-shop is Nanjundapa's.

Defendant No. 4's admissions are given below from his evidence. "My father and his brother were living in the same yard but partition walls had been put up. The brothers lived in separate portions." "Guru Chenabasavana, my uncle, predeceased my father by about a year. He died in the house he lived in. That house is by the side of ours."

In cross-examination an attempt was made to show that *Ex. A* was executed by this witness while he was not in his right senses. It will be seen that even if his temporary insanity be true, there was nothing to prevent defendant No. 5 who has also signed the document from raising an objection to the wording in this paper about the shop being his brother's share. This assertion that defendant No. 4 was not in his right senses is clearly an afterthought.

Nanjama, the mother of defendants Nos. 4 to 6, has clearly stated that when her nuptials were celebrated, and she joined her husband, he and his brothers were living separately and were managing their affairs separately. She admits also that that the suit-shop belongs to her brother-in-law, Guru Chenabasapa, and that she does not know why her sons are fighting for the same. According to this lady, thirty-five years ago at least, her husband and his brothers lived separately.

The brothers selling their properties independently of each other also confirms the fact of their being brothers divided in interest.

The oral and documentary evidence on record convince me that the suit-shop belonged to yejaman Nanjundapa and that he was divided from his brothers. This is my finding on the first issue.

The lease-deed *Ex. C* which defendant No. 7 could not but admit

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having executed and the admissions of defendants Nos. 4 and 5 that the shop was obtained from defendant No. 2 for opening a shop there, the notice sent by defendant No. 7 (*Ex. D*) clearly prove that the shop was leased to defendant No. 7 by defendant No. 2. Similarly there is abundant evidence to prove that defendant No. 2 was in possession before defendants Nos. 4, 5 and 6 took wrongful possession of the same by gaining over to their side defendant No. 7. I therefore answer the fourth and fifth issues in the affirmative.

By reason of findings on other issues adverse to defendants Nos. 4, 5 and 6, no finding is necessary on the seventh issue.

The plaintiff has been wrongfully kept out of his property. Defendants Nos. 4 to 7 have thus kept him out of his property, and are therefore liable to the plaintiff for the damages sustained by the latter. The rent of the shop from the date of sale up to institution of the suit, calculated at one rupee per month, does not appear to be an unreasonable sum to be awarded as damages to the plaintiff. Defendants Nos. 4 to 6 must pay this amount or Rs. 22. This is my answer to the last issue.

As a result of the foregoing findings I direct that a decree be passed ordering defendants Nos, 4 to 7 to put the plaintiffs in possession of the suit-shop and to pay them Rs. 22. These will also bear the plaintiffs' costs.

The issues on which the munsiff decided the case were—

1. Whether the suit-property belonged to yejaman Nanjundapa, having fallen to his share at a division between himself, Gubana, Guru Chenabasapa and Doda Chenabasana as alleged in defence?

2. Whether the suit-property was in Nanjundapa's possession and after his death in the then minor defendant No. 1's guardian's possession?

3. Whether defendant No. 1 is the adopted son of the said yejaman Nanjundapa and as such owner of the suit-property?

4. Whether defendant No. 2 leased the shop to defendant No. 7 as alleged by him?

5. Whether defendants Nos, 4 to 6 have all along been in possession of the shop or took wrongful possession lately as stated in defendant No. 2's written statement?

6. Whether, if defendants Nos. 4 to 6 are found to be entitled to the suit-property, the plaintiff is entitled to any and what remedy and against whom?

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7. Whether the plaintiff has incurred any loss and who is responsible to him for the same?

From the decree of the Munsiff defendants Nos. 4, 5 and 6 appealed to the Chief Court.

Mr. *C. Krishna Murti* for the appellants.

Mr. *L. Srinivasiengar* for the respondents.

The Judgment of the Chief Court (RAMACHENDRA IYER, Offg. C. J. and KRISHNA MURTI, J.) was as follows:—

The munsiff has very carefully discussed the evidence and the conclusions at which he has arrived are right. The evidence given by the mother of defendants Nos. 4, 5 and 6 shows that her husband was divided from his brothers. The facts admitted by her that defendant No. 1 was brought up by Nanjundapa and subsequently by Guru Chenabasapa and that all the property which was left by Nanjundapa is now in defendant No. 1's possession, support this defendant's case that he had been adopted by Nanjundapa. The shop was mortgaged by Nanjundapa; it was redeemed and subsequently mortgaged by Guru Chenabasapa; it was redeemed again by defendants No. 1 and 2, and let by them to defendant No. 7. These facts show that it was not the property of the father of defendants Nos. 4, 5 and 6.

We confirm the decree and dismiss the appeal with costs.

Appeal dismissed with costs.

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Before A. Ramachendra Iyer, Offg. Chief Judge and P. N. Krishna Murti, Judge.

1893
October 13.

MUNI BOYEE (PLAINTIFF) *v.* CHIKABALANA BOYEE AND OTHERS (DEFENDANTS).*

Marriage—Contract on behalf of adult—Damages.

The plaintiff sued to recover liquidated damages from the defendants for the breach by them of a contract to give their daughter in marriage to the plaintiff's cousin, who was no party to the agreement or to the suit, although an adult *sui juris*. *Held,* that the plaintiff had no right to negotiate for his cousin's marriage nor to sue for damages for the breach of any contract independently of him. Moreover the plaintiff did not assert that he had suffered any direct loss from the alleged breach of contract; and any prospective outlay he might have in marrying his cousin to another girl than the defendant's daughter, would be too remote to be taken into consideration as damages.

Mr. *L. Srinivasiengar* for the appellant.

Mr. *Sabapathi Iyer* for the respondents.

The Judgment of the Chief Court (RAMACHENDRA IYER, Offg. C. J. and KRISHNA MURTI, J.) was as follows:—

It seems to be unnecessary to go into the facts of this case and if it were necessary to do so we should have held that the evidence for the plaintiff has been discredited by the munsiff on insufficient grounds. But the claim itself seems to be inadmissible. The plaintiff's statement of the case is that he contracted with the defendants for the marriage of his cousin with their daughter, which agreement the defendants violated and his prayer for judgment is that the defendants should be made to pay him Rs. 150, which was the amount agreed to be paid to the plaintiff in case of default to enable him out of that

* Appeal No. 126 of 1893, against original decree No. 850 of 1892 of Mr. H. Timma Krishna Rao, Munsiff of Kolar, dated the 9th day of February 1893.

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money to find another girl and to celebrate his cousin's marriage with her. It is not disputed in this case that the cousin for whose marriage this contract took place is an adult and *sui juris*. He is no party to this suit and we are not prepared to hold that the plaintiff has any right to negotiate for his marriage or to sue for damages for the breach of any contract independently of him. Moreover the plaintiff does not assert that he has suffered any loss as a direct consequence of the defendants' breach of contract which he alleges; and any prospective outlay to which he may be put when celebrating his cousin's marriage is too remote to be adjudged in this suit. For these reasons we confirm the decision of the munsiff and dismiss this appeal with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 Nov. 13.

VEERAPA AND OTHERS (DEFENDANTS) v. ANJANAPA (PLAINTIFF).*

Limitation—Instalment bond—Proof of discharge—Evidence.

An instalment bond dated the 12th September 1889 was put in suit on the 15th October 1892. It contained a clause making the whole amount due payable, on default of payment of any instalment: and another stipulation that the whole amount should be payable within a month from date of default. The first instalment became due on the 12th October 1889. According to the defendants it was not paid, and the plaintiff offered no proof of payment. *Held*, that the suit was not barred by limitation, as time did not begin to run until the expiration of the one month's time allowed for payment from date of default; and as this did not expire until the 12th November 1889, and the suit was filed

* Appeals Nos. 94 and 95 of 1893, against original decrees Nos. 752 and 875 of 1892 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 31st day of January 1893.

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within three years from that date, it was not barred. *Held also*, on the evidence, that the payments alleged by the defendant appearing to have been made in satisfaction of a previous bond, subject of other litigation, and the discharge of the bonds sued on not having been satisfactorily established by the defendant, the defence failed throughout.

Mr. *Sabapathi Iyer* for the appellants.

Mr. *C. Krishna Murti* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

In these cases, the munsiff decreed the plaintiff's claim on two bonds bearing the same date, 12th September 1889. On one bond the amount claimed was Rs. 150 (in suit No. 752 instituted on 1st September 1892) and, on another instalment bond, the amount sought to be recovered was Rs.136 (in suit No. 875 filed on the 15th October 1892). With regard to the latter suit, it was contended by the defendant's counsel, that the claim was barred by limitation; but we are of opinion that this contention is untenable. It is true there is a stipulation in the instalment bond to the effect that, on default of payment of any one instalment on due date, the whole amount secured by the bond shall become payable without reference to the remaining instalments; but there is another stipulation also which has been lost sight of by the defendants' counsel, namely, that the whole amount shall be paid *within a month from date of default*. The bond is dated 12th September 1889. The first instalment of Rs. 10 became payable on the 12th October 1889. This, according to the defendants, was not paid, and the plaintiff, who alleged it was paid, offered no proof of the payment. Assuming

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therefore, that, owing to this default, the whole amount of the bond became payable at once, there was a further grace of one month allowed by the bond, so that the cause of action accrued to the plaintiff on the 12th November 1889. As the suit was filed within three years from that date, *i. e.*, on the 15th October 1892, it is therefore not barred.

Turning now to the defendant's plea of discharge of the whole amount due on the two bonds sued upon, we are of opinion the finding of the munsiff, that that plea is false, is correct. The defendant's case is that, in accordance with the settlement of a *panchayet*, made when another suit (No. 155 of 1891) between the parties was pending, a sum of Rs. 255 was paid through the said *panchayetdars* to the plaintiff, who fraudulently withheld the two bonds now in suit and deceived the defendant. The plaintiff was criminally prosecuted by the defendant, but without success, under s. 417 of the Indian Penal Code. In para 3 of his complaint petition and also in his sworn statement, he stated that the Rs. 255 were paid (in a lump sum) eight or ten days prior to the date of the complaint (1st June 1892). The razinama in suit No. 155 of 1891 was filed and that suit was compromised on the 1st June 1891. The defendant's witnesses examined in the present suit say the Rs. 255 were paid in two instalments. The first instalment, Rs. 100, was paid, according to the defendant's third witness, Malapa, two or three months after the *panchayet*, and the remaining Rs. 155 three or four months afterwards. The defendant's 2nd witness, Thamana, says he was not

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present when the first instalment was paid, but witnessed the payment of the second instalment eight or nine months after the *panchayet.* The fourth witness, Seethapa, also speaks to the payment of the two sums aforementioned soon after the settlement of the *panchayet* that took place a year and a half ago, but does not specify the time when the payments were made. The fifth witness, Venketsamapa, is also silent as to when the payments were made. Defendant's first witness, Venketsamia, examined on commission, says that the first instalment of Rs. 100 was paid within two or three months after the *panchayet* and the second instalment of Rs. 155 four or five months afterwards. If what these witnesses deposed be true, the Rs. 255 were paid in two instalments several months prior to the date of the criminal complaint and not in a lump sum about eight or ten days prior to 1st June 1892, as alleged by the defendant. It seems strange that the two sums referred to by the witnesses should have been paid to the plaintiff, notwithstanding the refusal or unwillingness of the plaintiff to return the two plaint-bonds and notwithstanding the attempt said to have been made by him to return three other documents unconnected with the settlement. It is also strange that the monies which the defendant is said to have paid into the hands of the *panchayetdars* should have been paid over by them to the plaintiff without obtaining a receipt or acknowledgment in writing of any kind from him. On a careful perusal of the whole evidence recorded in this suit and on a consideration of all the circumstances referred to in the lower court's judgment, we think the razi-

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nama filed in suit No. 155 of 1891 and the *panchayet's* settlement, in pursuance of which that razinama was filed, related to the principal amount Rs. 250 claimed in that suit and, on receipt of Rs. 255 paid in a lump sum as admitted by the plaintiff in full satisfaction of that claim, which was based on a separate bond duly registered, that litigation was put an end to; and the *panchayet's* settlement or the razinama of 1st June 1891 had no reference whatever to the two bonds now sued upon. The discharge of these two bonds not having been satisfactorily established, we affirm the munsiff's decision and dismiss these appeals with costs.

Appeals dismissed with costs.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893 Nov. 14.

NANJAPA, A MINOR, BY HIS GUARDIAN P. RAMACHANDRIA (PLAINTIFF) v. TAFA PAUPASANI (DEFENDANT).*

Guardian—Suit on behalf of minor.

A suit was instituted on behalf of a minor by a person who was subsequently appointed guardian of the minor's person; but no order was made appointing any one guardian of his property. *Held,* that, as the proceedings in regard to the guardianship of the minor did not clothe any person with power to sue on his behalf, there existed no legal objection to the continuance of the suit by the guardian who had instituted it and was subsequently appointed guardian of the minor's person.

Mr. *Ramaswamiengar* for the appellant.

Mr. *Narayana Rao* for the respondent.

The Judgment of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows:—

When the suit was filed by the guardian, there

*Appeal No. 167 of 1893, against original decree No. 518 of 1892 of Mr. H. Timma Krishna Rao, Munsiff of Kolar, dated the 19th day of July 1893.

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was no subsisting order to prevent that guardian from prosecuting the suit. The order of the Chief Court in regard to the minor's guardianship was passed at a subsequent date. The effect of it was to vest the movable property, placed before the district judge, in the district court and to appoint the plaintiff as guardian of the person of the minor. No one was appointed guardian of the property. As the proceedings in regard to the guardianship of the boy did not clothe any individual with power to sue on his behalf, we see no legal objection to the continuance of the suit by the guardian who instituted it and who has since been appointed guardian of the minor's person. We reverse the munsiff's decree and direct him to restore the suit to his file. The costs of the appeal will be costs of the suit and will abide the result.

Appeal allowed. Suit remanded for trial on the merits.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1893 Nov. 29.

KALU BASANA (DEFENDANT No. 1) v. CHICKA VEERANAPA ALIAS BAJAPA (PLAINTIFF).*

Decree—Fraud—Execution—Cancelment of decree—Costs.

The plaintiff had obtained a money decree and applied for its execution by attachment and sale of the defendant's property when he was met by the decree in a suit filed two and a half months after his decree, upon a bond hypothecating the defendant's property to another person. He thereupon filed a suit and obtained a decree declaring that the hypothecation bond was fraudulent, and the decree upon it collusive; directing both bond and decree to be cancelled and that he had a right to proceed in execution against the property. *Held*, that, on the facts the find-

* Appeal No. 69 of 1893-94, against original decree No. 1082 of 1892 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 26th day of June 1893.

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ings were correct that the hypothecation bond was not genuine and the decree upon it collusive and fraudulent, but that the lower court had no power to cancel the decree, without any motion by the parties to it to set it aside. The plaintiff who was a stranger had no right to pray for its cancellation. What he was entitled to was to pray for a declaration that the decree was inoperative against him and was no bar to the execution of the decree he had obtained.

Costs allowed were remarked to be excessive. The batta of witnesses not examined was disallowed and the expenses granted only of those who were examined.

The suit was to declare that a hypothecation deed alleged to have been executed by Basapa the deceased father of defendant No. 2 to defendant No. 1 on 28th January 1884 and a decree obtained thereon by defendant No. 1 in O. S. No. 430 of 1892 on the file of the Court of the Munsiff of Bangalore against defendant No. 2, were fraudulent; and to cancel the attachment thereunder of certain property specified and also for a decree that the said property is subject to a prior liability for the amount of a decree obtained by the plaintiff in small cause No. 215 of 1891 on the file of the Sub-judge's court, Bangalore, against defendant No. 2.

The plaint was as follows :—

1. Defendant No. 2's father Abady Basana, deceased, borrowed Rs. 50 from plaintiff and executed a bond on the 5th August 1890 for the said amount.

2. The said Basapa died after seven or eight months after the execution of the said bond. Basapa has no other heir but defendant No. 2. Defendant No. 2 is under the protection of a guardian.

3. The plaintiff filed a suit against defendant No. 2 appointing Apisamapa as guardian of defendant No. 2 in Small Cause Case No. 2157 of 1891 on the file of the Sub-judge's court, Bangalore, to recover the principal and interest due to the plaintiff on the said bond. Defendant No. 2 pleaded in the said suit through her guardian that the plaintiff's bond was not a genuine one, and also that her father was not in such a state as to berrow money from the plaintiff. In the said suit the guardian of defendant No. 2 and one

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Veerasetapa gave evidence consistent with the defence of defendant No. 2. The case was decided against the property of the deceased Basapa in favor of the plaintiff on 1st April 1892.

4. Afterwards the plaintiff presented an application for the execution of the said decree. The guardian of the defendant No. 2 brought to the notice of the Sub-judge's court, Bangalore, on 27th May 1892, that he was unwilling to remain as the guardian of defendant No. 2 and to cancel his guardianship to defendant No. 2. Then a separate guardian was appointed. By the time that the plaintiff executed the said decree after the appointment of a separate guardian, some persons who were not on good terms with plaintiff, colluded with the following persons namely, Kalu Basana, Verasetapa, Anayapa, Kuthapana Putana, guardian Apisamapa and his son Chicka Verasetapa, who were assisting defendant No. 2 in the suit brought against him by the plaintiff. These persons with the ill-feeling arising from their attempts having been rendered useless, concocted an hypothecation deed, said to have been executed by Basapa the deceased father of defendant No. 2 and filed a suit against defendant No. 2 in O. S. No. 430 of 1892 on the file of this court after the appointment and consent of the said guardian and obtained a fraudulent decree on 30th June 1892.

5. In execution of the said decree they attached, in execution case No. 1253 of 1892, the house mentioned in the plaint schedule, which belonged to the deceased Basapa, and which is said to have been hypothecated to defendant No. 1. The said property that was attached was ordered to be sold on the 22nd December 1892. The plaintiff also attached the same house in execution case No. 2366 of 1892 on the file of the Sub-judge's court, Bangalore.

6. That all the above persons colluding with one another have attempted to defraud the plaintiff of his decree amount by putting to sale the property mentioned in the schedule alleging a prior liability for the decree obtained fraudulently on the said concocted deed without the knowledge of the plaintiff. Hence the suit.

7. Cause of action accrued to the plaintiff on the 17th December 1892 that is when the plaintiff attached the suit-house and when he came to know that the guardian of defendant No. 2 was intending to defraud the plaintiff.

8. The plaintiff prays for judgment:—

a. Declaring that the hypothecation deed said to have been executed by Basapa, deceased, the father of defendant No. 2 in favor of defendant No. 1 on the

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28th January 1884 and that a decree obtained by defendant No. 1 on the said bond in O. S. No. 430 of 1892 on the file of this court against defendant No. 2 are fraudulent and to cancel the attachment of the property mentioned in the schedule which was made by defendant No. 1.

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b. Declaring that the said property is subject to a prior liability for the amount of the decree obtained by the plaintiff in small cause No. 2157 of 1891 on the file of the Sub-judge's court, Bangalore, against defendant No. 2.

c. Directing the defendants to pay plaintiff the costs of the suit.

d. Granting such other relief as the court deems fit.

Defendant No. 1 filed the following written statement :—

The plaintiff knows nothing of the allegations made in paras. 1—3 and in first part of the 4th para. of the plaint.

2. The allegations made in the latter part of the 4th para. of the plaint, are false.

3. The bond executed by the deceased Abby Reddy Basana to defendant No. 1 in this suit is a genuine one. The decree obtained by defendant No. 1 in O. S. No. 430 of 1892 on the file of this Court against defendant No. 2 Chenama on the said bond, is also a genuine one.

4. The plaintiff in collusion with the following persons namely Chicka Verana, Prabusamapa, Nunjundapa, son of Sidalingana and Maduray Nunjundapa brought this suit alleging false facts.

The following were the issues in the case :—

1. In the mortgage deed said to have been executed by the late Basana to defendant No. 1 genuine ?

2. Was the decree obtained in O. S. No. 430 of 1892 a fraudulent one ?

3. Is plaintiff entitled to a cancelment of the said bond and decree ?

4. To what relief, if any, is plaintiff entitled ?

The following judgment was passed by the Munsiff :—

The chief question is whether *Ex. C* said to have been executed by the late Basana to defendant No. 1 is a genuine document. The plaintiff denounces it by saying it was got up in order to

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defraud the plaintiff by defeating the execution of his decree. It is admitted on both sides that great enmity prevails between the plaintiff and defendant No. 1. It further appears that the parties belong to two different and opposed factions. Defendant No. 1 was fined upon the evidence given by the plaintiff.

The bond in question is written by Putta Rudrapa and attested by Rudra Muniapa and Chicka Veera Setty. The writer is Sodara Mava a relative of defendant No. 1. He is further Gumasta of defendant No. 1's brother. The plaintiff's brother has obtained a decree against him. He is therefore interested in defendant No. 1 and opposed to the plaintiff. Attesting witness, Rudra Muniapa, is sister's son of the writer of the bond.

In a case by the witness against Nunjundapa, the plaintiff appears to have given evidence for Nunjundapa and ultimately the witness lost his case. The other attesting witness is the son of defendant No. 2 in the case. He deposed against the plaintiff when the latter sued defendant No. 2 as guardian of Basana's daughter on his bond. In spite of his evidence the plaintiff obtained a decree. I need hardly say that the defendants are in collusion with one another as against the plaintiff. This witness has stated that the late Basana had money dealings to the extent of Rs. 400 or Rs. 500 and that he lent to others to that extent. The evidence of these witnesses is not convincing. It is therefore unreliable.

A careful comparison of the disputed signatures of Basana in *Ex. C* betrays material difference from the admitted genuine signatures of *A*, *B* and *F*. The formation and style of letters are not similar.

From the nature of the evidence, from the surrounding circumstances and from the comparison of signatures, I feel satisfied that exhibit *C* is not a genuine document. I find the first issue in the negative.

The decree in O. S. No. 430 of 1892 is a decree by consent of defendant No. 2 who was guardian *ad litem* of the infant defendant. The decree was passed in favor of the plaintiff in collusion with him. The bond *C* on which the decree was passed, has been found not to be genuine. I hold therefore that the decree in O. S. No. 430 of 1892 is a fraudulent one.

Upon the findings recorded by me, the plaintiff is entitled to the cancelment of the bond marked *C* and of the decree in O. S. No. 430 of 1892. The third issue is also found against the defendants.

Therefore there will be a decree directing the cancelment of the bond *C* and of the decree in O. S. No. 430 of 1892 of this court

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and declaring the plaintiff entitled to proceed against the property described in the plaint-schedule in execution of his decree and directing the defendants to pay costs of this suit.

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The first defendant appealed against the Munsiff's decree to the Chief Court.

Mr. *N. Cheluviengar* for the appellant.

Mr. *Ramaswamiengar* for the respondent.

The Judgment of the Chief Court (THUMBOO CHETTY C. J. and RAMACHENDRA IYER, J.) was as follows :—

We agree in the munsiff's finding that the bond which was put in suit by the first defendant against the second was not genuine. The suit was filed about two and a half months after the plaintiff had obtained a decree against the second defendant. The first defendant had allowed the remedy against the debtor's person to be barred by limitation and no explanation of the delay was given. The second defendant's guardian, who had been appointed guardian in the suit filed by the plaintiff and who, on the 24th June 1892, represented to the court that he was too old to do anything for the minor and therefore prayed to be relieved from the office, had no hesitation in accepting the guardianship on the 30th June and in consenting to a decree being passed against the property. The evidence which was given by the guardian's son in defendant No. 1's suit was not consistent with the evidence he had given in the plaintiff's suit.

The munsiff had no power to cancel the decree which had been made in the suit filed by defendant No. 1, when the parties thereto made no motion for its being set aside. The plaintiff who was a stranger had no right to pray for its cancellation.

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What he was entitled to was to pray for a declaration that the decree which had been obtained by defendant No. 1 was inoperative against him and was no bar to the execution of the decree he had obtained against the assets left by the minor's father. The decree will be modified accordingly and the appellant will pay the respondent's costs.

We observe that the costs which were incurred by the parties in the lower court were out of all proportion to the subject-matter of the suit. The plaintiff has swollen the bill of costs by summoning and paying batta for ten witnesses. He examined only four and closed his case. We are not in a position to state the necessity for summoning six more witnesses and we therefore disallow the costs incurred on account of the latter. The plaintiff has paid Rs. 27-8-0 for the four witnesses examined by him and this sum only we allow.

Appeal allowed in part. Decree modified.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1893 Nov. 29.

SUBARAYA, SINCE DECEASED, BY HIS REPRESENTATIVES, VENKATARAMIA AND VENKANIA, THE LATTER A MINOR, BY HIS BROTHER AND NEXT FRIEND, PLAINTIFF No. 1 (PLAINTIFFS) v. NARASEE AND OTHERS (DEFENDANTS).*

Ejectment—Notice—Mysore Land Revenue Code, s. 80—Permanent right of occupancy—Yearly tenancy—Wara tenure—Onus of proof.

In a suit for ejectment and mesne profits, where the defendants set up a right of permanent occupancy, *Held* that the onus of proof lay on them. Although they failed to discharge it, and it

*Appeal No. 68 of 1893-94, against original decree No. 533 of 1891 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 23rd day of June 1893.

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was shewn they were only yearly tenants, yet they could not be ejected without proper notice and as the plaintiff had brought suit without such notice he could get a decree only for the rent due but not for possession of the land.

On the evidence the tenure was held to be *wara,* that is to say, there was no payment of rent in kind or cash at a fixed rate. If in any year there was no crop or if the crop raised failed either wholly or partially owing to drought or other causes, the landlord had no right to complain or to claim payment of any rent; whereas if the land was taken up permanently at a fixed rate of rent in kind or cash, the tenure would be permanent and give the defendants a permanent right of occupation subject to payment annually of some fixed amount of rent. *Wara* is an uncertain share in the produce depending on the actual out-turn. * * * Where rent or *kundayem* has been paid at a certain rate for a considerable time, the principle affirmed in the decisions is that payment of rent in a particular form at a fixed rate is presumptive evidence that the parties have agreed that it was obligatory on one to pay and the other to receive rent in that form or at that rate so long as the relation of landlord and tenant may continue. *Venkoba Row* v. *Dharama Sing and another*(1) approved.

Mr. *N. Cheluviengar* for the appellants.

Mr. *Narayana Rao* for the respondents.

The following Judgments were delivered by the Chief Court:—

THUMBOO CHETTY, C. J.—The plaintiff sued to eject the defendants from and to recover possession of certain lands, with mesne profits or their value Rs. 50, on the ground that they failed to give *wara* (or share of the produce) in the year Vikruti and cultivated the lands after such default without the knowledge of the plaintiff.

The defendants pleaded that they held the land on *arakundayem* tenure, *i. e.*, on condition of paying half the *kundayem* and a quarter share of the produce, that for the year Vikruti they paid a moiety of

(1) 11 M. L. R., 123.

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the *kundayem* and also a quarter share out of crops raised on the lands and that the plaintiff refused to receive the share in other crops when tendered and brought this false suit. The defendants, in short, pleaded they had a permanent right of occupation and were not liable to be ejected.

Seven witnesses were examined for the plaintiff and eight for the defendants. The munsiff found that the defendants held the land on *arakundayem* tenure for more than fifteen years and that the plaintiff's allegation, that he leased the land to the defendants, was false. The munsiff awarded to the plaintiff a certain quantity of produce, as particularised in his decree, or the value (Rs. 29-15-8) plus Rs. 2-8-0 for *arakundayem*, in all Rs. 32-7-8; the suit for possession of the lands was dismissed and the plaintiff was directed to pay the defendants' costs.

The plaintiff has appealed, contending that he was entitled to recover possession of the lands from the defendants, also the produce as claimed in the plaint, and that the defendants had no permanent right of occupation.

First, as to the nature of the tenancy, the evidence is equally divided and conflicting. While the plaintiff's witnesses allege that the defendants were paying only *wara* or a third share of the produce, the defendants' witnesses assert that they were paying *arakundayem*, *i. e.*, one-fourth share of the produce and a moiety of the fixed amount of *kundayem*. The plaintiffs have no accounts of any kind to prove what payments were from time to time made by the defendants. On the other hand, the testimony

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of the defendants' witnesses, which is also vague and general, is not supported by any vouchers or receipts evidencing payment of half *kundayem* by the defendants. The onus of proving the special payment of half the assessment rested on the defendants, who failed to offer any reliable and satisfactory evidence on the point. If the defendants held the lands on *arakundayem* tenure for more than fifteen years, they must have from time to time obtained some receipt or other acknowledgment from the landlord. In the absence of such vouchers, we are unable to find that such payment was made. We are disposed to accept the evidence of the plaintiffs' witnesses, especially that of the sixth witness, Sreekunta, who took oath in the particular form desired by the defendants and who positively stated that the defendants never held the lands in suit on *arakundayem* tenure, but only on the usual tenure of giving a share out of the produce. If, as we find, the tenure was a *wara* one, there was no payment of rent in kind or cash at a fixed rate. If in any year there was no crop, or if the crop raised failed either wholly or partially owing to drought, or other causes, the landlord had no right to complain or to claim payment of any rent, whereas, if the land was taken up permanently at a fixed rate of rent in kind or cash, the tenure would be permanent and give the defendants a permanent right of occupation subject to payment annually of some fixed amount of rent. In *Ramiah* v. *Bheema Row*(1), the tenant who held possession of the land for thirty years on an annual fixed payment of Rs. 9 as rent was held to have

(1) 6 M. L. R., 92.

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acquired a permanent right of occupancy. In the present case, there was no agreement to make any fixed payment of rent or *kundayem*. In *Venkoba Row* v. *Dharama Sing and another*(1), it was held, following the decision of the Madras High Court in *Venkatagopal* v. *Rangappa*(2), that the defendants, who for three generations paid rent or *kundayem* at a certain rate and not *wara* as in this case (which was an uncertain share in the produce depending on the actual out-turn) had acquired a permanent right of occupancy. In all these cases, the principle affirmed is, that payment of rent in a particular form, at a fixed rate, is presumptive evidence, that the parties have agreed that it was obligatory on one party to pay and the other to receive rent in that form or at that rate, so long as the relation of landlord and tenant may continue. That principle is inapplicable to the present case, as the alleged payment of *arakundayem* has not been proved.

Now the question for consideration is, whether the defendants are liable to be ejected, they having failed to prove the permanent lease pleaded by them. This suit was brought without any notice of ejectment. In the case of *Purshotam Bapu* v. *Dattatraya*(3) it was held that a defendant who failed to prove the permanent lease set up cannot be regarded as having consented to the contract of yearly tenancy being treated as cancelled and that he was entitled to a reasonable notice to quit, expiring at the end of the revenue year. We concur in this decision. In *Rajendronath Mookhopadhya* v. *Bassider Ruhman*

(1) 11 M. L. R., 123. (2) I. L. R. 7 Mad., 365.
(3) I. L. R. 10 Bom., 669.

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Khondkhar(1) Garth, C. J. held that a ryot, whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year, is entitled to have a suit for ejectment brought against him by his landlord dismissed, on the ground that he has had no such notice. This decision was followed by us in a recent case and we think that both on principle and grounds of natural justice, we ought to set our face against the summary eviction of tenants without proper notice.

The plaintiff is not entitled to recover possession of the lands sued for. He is only entitled to the produce. The munsiff has awarded only a fourth share, whereas the defendants are liable to pay one-third share. The munsiff's estimate of the out-turn is not shown to be excessive and the quantity and value mentioned in the decree of the lower court will therefore be increased by one-twelfth, so as to make up the one-third share due to the plaintiff.

As the plaintiff alleged a lease to the defendants which was untrue and as the defendants set up a false defence as to the nature of the tenure, each party will be directed to bear his or their own costs throughout.

RAMACHENDRA IYER, J.—I agree in the conclusion that the defendants have failed to prove the alleged right of permanent occupancy. In regard to the question of notice, I find that s. 80 of the Mysore Land Revenue Code enacts that an annual tenancy shall, in the absence of any special agreement to the

(1) I. L. R. 2 Cal., 146.

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contrary, require for its termination a notice given in writing by the landlord to the tenant or by the tenant to the landlord, at least three months before the end of the year of the tenancy, at the end of which it is intended that the tenancy is to cease. The first part of the section enacts that an annual tenancy, shall, in the absence of proof to the contrary, be presumed to end on the 31st March. There can be no doubt that the defendants were tenants from year to year and that they were entitled to notice in January 1891, if the plaintiff wished to determine the tenancy at the end of the cultivation season in that year.

Appeal allowed in part without costs.

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Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

CHIK MALLIA, A MINOR, BY HIS GUARDIAN HOTTE RANGANA (PETITIONER) *v.* GOVINDA AND OTHERS (COUNTER-PETITIONERS).* 1893 *June* 23.

Certificate of administration—Act for collection of debts on succession (XXVII of 1860)—Code of Civil Procedure (Act XIV of 1882) s. 366, Explanation—Right of certificate-holder to continue suit.

The adopted son of a deceased plaintiff had obtained a certificate to collect debts due to the deceased under Act XXVII of 1860 and claimed to be allowed to continue the suit which was for recovery of a debt. *Held* that he should be allowed to continue the suit, *(per* THUMBOO CHETTY, C. J.) as adopted son of the deceased; *(per* KRISHNA MURTI, J.) as holder of the certificate of administration.

THUMBOO CHETTY, C. J.—A certificate of heirship does not of itself constitute the holder legal representative of the deceased; yet as it is not denied that he is the adopted son of the deceased he is as such entitled to ask the court to substitute his name for that of his adoptive father.

KRISHNA MURTI, J.—The object of the Explanation to s. 366 of the Code of Civil Procedure seems to be to indicate the exact scope and extent of the operation of a certificate granted under Act XXVII of 1860. The holder is not entitled to recover any property other than debts on the strength of it or to enforce a right to succeed to the movable or immovable property of the deceased. The holder of the certificate has the right to represent the deceased and collect the debts due to the estate and to that extent he is doubtless the legal representative of the deceased to continue this suit, which is for the recovery of a debt.

Quære, whether the certificate of heirship referred to in s. 366 (Explanation) of the Code of Civil Procedure has any existence at all in Mysore.

Mr. *K. T. Narasim Iyengar* for the appellant.

The Judgments of the Chief Court were as follows:—

THUMBOO CHETTY, C. J.—We think the munsiff

* Appeal No. 15 of 1893, against orders Nos. 101 and 144 of 1892 of Mr. B. Basavaradhya, Munsiff of Maddagiri, dated the 23rd day of January 1893.

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was wrong in refusing to admit the appellant as the legal representative of his deceased adoptive father, and to substitute his name for that of the deceased plaintiff and to allow him to proceed with the suit. Although the certificate of heirship produced by him does not of itself constitute appellant the legal representative of the deceased plaintiff; yet, as it is not denied that the appellant is the adopted son of the deceased, he is, as such, entitled to ask the court to substitute his name for that of his deceased adoptive father. In the certificate of heirship, the appellant is described as the adopted son of the deceased plaintiff, and if the alleged adoption has not been expressly denied, it was unnecessary for the appellant to prove the fact by evidence. The proceedings do not show that there was any such denial. I would, therefore, set aside the munsiff's order and direct him to substitute the appellant's name for that of the deceased plaintiff and to proceed with the suit. The costs of this appeal will be costs in the cause and abide the munsiff's decision.

KRISHNA MURTI, J.—The object of the explanation appended to s. 366 of the Code of Civil Procedure seems to be to indicate the exact scope and extent of operation of a certificate granted under Act XXVII of 1860. Such certificate only authorises the holder thereof to collect debts on account of the estate of a deceased person, and affords protection to the payer from any further liability in connection with the same discharged debt. It does not go to the length of showing that the holder of the certificate is the absolute heir of

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the deceased, or that he is his legal representative for all and every purpose in the full sense of the term. For instance, the holder of such a certificate, it is presumed, is not entitled to recover any property other than debts on the strength of it, or to enforce a right to succeed to the movable or immovable property of the deceased. Representing a deceased in a court of justice in a suit for any of the latter purposes is apparently not covered by such a certificate. *Awkinfee, representative of the estate of the late Mewsoon* v. *Mee Nay*(1) and *Sevinthia Pillay* v. *Mootoosawmy and another*(2). The legislature seems to have added this explanation to indicate the very limited operation of a certificate under Act XXVII of 1870, and to warn the courts not to give it any wider effect. But, in the present instance, the suit is laid to collect a debt due from the defendants to the estate of the deceased plaintiff, and it seems really incompatible with sound principles of justice to hold that a certificate granted by a court of competent jurisdiction, for the express purpose of authorising and enabling the holder of it to collect debts, does not give him the right to continue a suit laid by the deceased for the collection of such debt. The munsiff has, by his order, set at naught a valid certificate given by a competent court and has, in so doing, misunderstood the object and the scope of the explanation. He is bound to give due and legal effect to the certificate under which the petitioner has the right to represent the deceased and collect the debts due to the estate, and to that extent he is doubtless the legal representa-

(1) 8 W. R. Civ., 1. (2) 8 W. R. Civ., 2.

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tive of the deceased to continue this suit, which is for the recovery of a debt. The order appealed against is set aside, and the munsiff directed to allow the petitioner to continue the suit.

It may be added that it is not clear whether the certificate of heirship referred to in s. 366 of the Code of Civil Procedure has any existence at all in Mysore. I am not aware of any law requiring a subject of this State to obtain such a certificate to give him a legal status for any purpose. The provision regarding it is possibly of no local application and is a redundancy of no present utility introduced with the British Indian Code.

Appeal allowed.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 August 1.

MYLARIA (PLAINTIFF) v. MAHOMED NIZAMOODIN SAIB AND OTHERS (DEFENDANTS).*

Jurisdiction—Partnership—Contract Act (IX of 1872) s. 265—Mysore Regulation VI of 1892—Retrospective effect of amending enactment.

Retrospective effect cannot be given to an enactment such as Regulation VI of 1892 extending to Mysore the provision of Act IV of 1886 which omitted the proviso formerly appended to s. 265 of the Contract Act (IX of 1872). A suit to wind up the business of a partnership therefore, filed before the amending Regulation came into force, is cognisable only by the District Court.

The Order of the District Court was as follows :—

The subject-matter of the plaintiff's claim, according to the plaint, is valued at five hundred rupees. Under the provisions

* Appeal No. 21 of 1893 against order No. 32 of 1890 of Mr. T. Narahari Row, District Judge of Nundidroog, dated the 10th day of April 1893.

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of Regulation VI of 1892, the munsiff has jurisdiction in the suit. The special jurisdiction vested in district courts by s. 265 of the Indian Contract Act has been taken away by the said Regulation.

The plaintiff must take back the plaint and present it in the proper court. The plaint will be returned for the purpose of being filed in the proper court.

Under the circumstances of the case, as the costs already incurred on either side will have to follow the result of the suit on the merits, this court will pass no orders about costs.

Mr. *Nunjundapa* for the appellant.

Mr. *Sabapathi Iyer* for respondents Nos. 5 and 6.

The Order of the Chief Court (THUMBOO CHETTY, C. J.) and KRISHNA MURTI, J.) was as follows:—

We are of opinion that the district judge was wrong in giving retrospective effect to Regulation VI of 1892, which amended s. 265 of the Contract Act, by omission of the proviso appended to the section. This suit having been filed prior to the date of passing of the said Regulation, the district judge was not competent to return the plaint, on the ground that he had no jurisdiction to try it. The Regulation (VI of 1892) applies to all applications made under s. 265 of the Contract Act, subject to the date of its promulgation. The case is, therefore, remanded with directions to restore it to the file of the district judge and to dispose of it on the merits.

Appeal allowed. Suit remanded for trial.

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Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1893
Nov. 27.

KENCHA HANUMIA (PLAINTIFF) *v.* NARAYANASAMI MOODLIAR AND ANOTHER (DEFENDANTS).*

Jurisdiction—Partnership—Suit for dissolution and winding-up.

A suit, so framed as to claim only payment of a sum of money within the limit of the Sub-Judge's jurisdiction appeared on examination to be really one for dissolution and winding-up of a partnership. One of the items was beyond the jurisdiction of the Sub-Judge. *Held* that the Sub-Judge had no jurisdiction and the suit should be brought in the District Court.

The Plaint in this case was as follows:—

1. An agreement was entered into between the plaintiff and defendant No. 1 on the 19th February 1892 to the following effect:—

(1). That the plaintiff and defendant No. 1 as partners, should supply fuel to the S. M. R. Co.

(2). That the plaintiff should pay the necessary capital amount for carrying on the contract business.

(3). That defendant No. 1 should be the working partner and carry on the work regularly.

(4). That defendant No. 2 should attend to all the accounts and correspondence connected with the contract.

(5). That out of the profits arising from the business, a portion should be set apart for the capital amount together with the interest thereon and also for the monthly contingencies and establishment costs and, out of the balance, the plaintiff to get an eight-anna share, defendant No. 1 a six-anna share, and defendant No. 2 a two-anna share. According to the foregoing agreement, the plaintiff and the defendants carried on the business from the 1st of January 1892 to the 4th of May 1893 of supplying fuel to the above Company.

2. After the expiration of the term of contract, *i. e.*, on or about the 4th May 1893, the business came to a close.

3. Since that date there was a dispute between the parties about the settlement of accounts and defendant No. 1 issued a notice to the Locomotive Superintendent through his Advocate Mr. Muru-

* Appeal No. 7 of 1893-94 against order returning plaint in O. S. No. 161 of 1893-94 of Mr. H. V. Nunjundia, Subordinate Judge of Bangalore, dated the 29th day of August 1893.

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gesa Moodelliar, stating that cheques should not be granted by the Company unless the receipt were duly signed by both defendant No. 1 and the plaintiff.

4. Defendant No. 1 did not settle the dispute that existed between the plaintiff and himself through panchayetdars though often required to do so and did not sign the receipt to obtain the cheques from the Railway Company. The Railway Company said that unless the receipt was produced duly signed by defendant No. 1 they would not issue cheques and re-called the cheques issued from Dharwar for delivery to the plaintiff and defendant No. 1, owing to the objection of defendant No. 1. Defendant No. 1 is the cause of much loss to the plaintiff on account of his obstinacy.

5. The plaintiff is ready to pay the debts that fall to his share in the partnership business according to the terms of the partnership deed. Defendant No. 1, though called upon by the plaintiff several times to pay up the excess amount drawn by him over what was due to him, to make good the loss that accrued owing to his carelessness to attend to the needful work at its proper time according to the terms of the partnership deed and to pay plaintiff the balance of capital with interest, as well as his share of the profits, has failed to do so, and has caused loss to the plaintiff. Hence this suit.

6. Defendant No. 2 is also made a party to the suit as he is entitled to a two-anna share in the profit.

7. The cause of action accrued to the plaintiff at Bangalore on or about the 9th May 1893.

8. The plaintiff prays judgment:—

For an examination of the partnership accounts of the firm; for the recovery of the moneys due to the partnership firm; for payment into court of the money due by the plaintiff and the defendants on examination of the accounts; for a division between the plaintiff and the defendants of the balance of the profits after deducting the debts due by the partnership firm; for directing the plaintiff and the defendants to pay proportionately the debts due by the partnership firm in case the assets of the partnership firm are found insufficient to pay up the debts; for court costs and for such other relief as the court may see fit to grant. The amount of capital and profits due to plaintiff is about Rs. 1,200. The plaintiff at present has paid the institution fee on this amount. If, on the examination of accounts, it is found that a larger sum is due to the plaintiff, he is ready to pay the institution fee on the excess so found due to him.

It was returned by the subordinate judge

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because one of the items, subject of the suit, was a matter of Rs. 14,000 and therefore beyond his jurisdiction, which extended to suits for Rs. 5,000 only.

An appeal was made to the Chief Court against this order.

Mr. *Nunjundapa* for the appellant.

Mr. *Vencataramia* for respondent No. 1.

The Order of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) was as follows:—

Although this was styled a suit for an account and although the relief claimed by the plaintiff was for payment of a sum of money under Rs. 5,000, yet we think the suit is distinguishable from an ordinary one for account. The court would have to appoint a receiver to collect outstandings, and to provide for the payment of debts due to third persons. In fact, it is a suit for dissolution and winding-up a firm. One of the items being a sum of Rs. 14,000, we think the suit ought to be adjudicated on by the district judge and not the subordinate judge. We confirm the subordinate judge's order and dismiss the appeal with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 Nov. 29.

CHENDRASEKHARIA (JUDGMENT-DEBTOR) v. GOPALIA (PLAINTIFF).*

Attachment—Sale in execution—Limitation.

An application for execution of a decree was filed on the 22nd May 1890. An order was then made allowing a claim to the

* Appeal No. 16 of 1893-94, against order in execution No. 65 of 1893 of Mr. H. Timma Krishna Row, Munsiff of Kolar, dated the 8th day of September 1893.

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attached property. This claim was set aside on appeal to the Chief Court. A subsequent application for sale of the property was made within three years from the date of the Chief Court's decree, but beyond three years from the date of the original attachment. *Held*, that the decree-holder's right to apply for sale accrued from the date of the appeal decree removing the obstruction of the claim which prevented the sale of the property: and as the application for sale was within three years from the accrual of such right, it was not barred.

The Order of the Munsiff was as follows :—

The contention that the present application, dated 8th August 1893, is put in after three years from the last application cannot stand. The last execution application was not 441 of 1890, but execution No. 1042 of 1890, filed on the 7th October 1890. The present application is in time.

As to the second point, I think that the attachment made in execution No. 441 of 1890 is in force though more than three years from the date of attachment (22nd May 1890) has passed. The question as to how long an attachment stands has to be decided on the intention of the parties. No hard and fast rule can be laid down. That it would last for only three years is based upon an *obiter dictum* of the Chief Court in a case from this court. I think the decision of the Chief Court in O. S. No. 289 of 1891 and Appeal No. 27 of 1893, and the last execution application No. 1042 of 1890 keep the attachment intact. The whole of the property attached in execution No. 441 of 1890, will be sold. As the counter-petitioner wants to appeal, the sale will be fixed for a distant date.

Mr. *Nunjundapa* for the appellant.

Mr. *C. Krishna Murti* for the respondent.

The Order of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows :—

The Munsiff's order is correct and must be upheld. The plaintiff's right to sell the attached property had been obstructed by the order in the claim case allowing the claim. This obstruction was removed by the decree of this court in Appeal No. 27 of 1893, which had also the effect of restoring the attachment. The plaintiff's right to apply for the

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sale accrued from the date of the appeal decree already referred to and, as the application to sell is within three years from the accrual of such right, the munsiff was right in granting the application and ordering the sale. This appeal is dismissed with costs.

Appeal dismissed with costs.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 *November 29.*

MARY MAGDALENA COELHO (DEFENDANT No. 2) v. DR. SIDNEY SMITH (PLAINTIFF).*

Decree—Construction—Interest.

A decree was made payable by instalments, the first to be payable "immediately on the passing of the decree and the settlement of all claims against the estate." *Held* that this did not apply to all and every possible claim that might thereafter be advanced but only to certain specified claims well understood by the parties, which defendant No. 1 had undertaken to adjust with the creditors and obtain releases for from them. That from the date of these releases being brought in and accepted by the court, the decree-holder was entitled to interest as well as to payment of the first instalment.

Mr. *L. Srinivasiengar* for the appellant.

The Order of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows :—

We see no reason to grant this appeal.

The payment of the first instalment was made to depend upon the settlement of the claims, and as the words "from this date" are quite clear, and do not admit of any ambiguity, they must be held to mean the date of the decree. This construction is not unreasonable, because it is reasonable to sup-

*Appeal No. 29 of 1892 against order No. 12 of 1892 of Mr. C. Cress, District Judge of Nagar, dated the 19th day of July 1892.

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MARY MAGDALENA COELHO v. DR. SIDNEY SMITH.

pose that the parties expected all the differences between them would be settled in less than a year, and did not want to make the payment of that instalment depend upon any uncertain circumstance and, therefore, fixed the time when it was payable with reference to the date of the decree. The order to withhold payment was passed for the protection of the plaintiff's interest in the event of any large claim being established to his prejudice, but that circumstance does not prevent defendant No. 2 from recovering interest if in the end it is held that the payment to her was unnecessarily deferred. This view is equitable, when it is borne in mind that as the result of the decree the plaintiff is in possession of the property and is enjoying its produce.

Appeal dismissed.

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REFERENCES UNDER THE STAMP ACT.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893
May 22.

VISVANATHA BHATA (PLAINTIFF) v. NAGESIA (DEFENDANT).*

Stamp Act (I of 1879) ss. 9, 33 and 34—Duly stamped—Mysore Government Stamp bearing seal of British Resident's Treasury—Bangalore Civil and Military Station forms part of Mysore.

A document executed on a Mysore Government stamp-paper, impressed on the back with the seal of the Resident's Treasury, Bangalore, cannot be legally treated as unstamped in Mysore. The Civil and Military Station of Bangalore though assigned free of charges to the exclusive management of the British Government still forms part of Mysore.

The Full Bench of the Chief Court (THUMBOO CHETTY, C. J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) pronounced the following opinions:—

THUMBOO CHETTY, C. J.—The plaintiff is a resident of Ooparhalli Laul-bagh, and the defendant is a resident of Madivala of Bangalore taluk.

On the 20th April 1887, the defendant purchased a stamp paper of the value of four annas and executed a document in favor of the plaintiff. Upon this document the plaintiff sued the defendant in Small Cause No. 529 of 1892, when a sum of Rs. 5-4-0, as duty and penalty, was levied from the plaintiff by the Sub-Judge (Mr. *Venketvaradiengar*) apparently on the ground that the stamp paper was issued through the Resident's Treasury, Civil and Military Station, and was purchased from one of the vendors in the said Civil and Military Station and the duty was not paid to the Mysore State. The

* Civil Reference No. 2 of 1893 made by Mr. H. V. Nunjundaya, Sub-Judge of Bangalore, in O. S. No. 2760 of 1892, dated the 15th day of March 1893.

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present suit (No. 2760 of 1892) was brought by the plaintiff to recover from the defendant the duty and penalty paid as aforesaid. The present Sub-Judge (Mr. *Nunjundaya*) has referred for the opinion of this court the following question :—

"Whether a document executed on a Mysore Government Stamp paper, which is impressed on the back with the seal of the Resident's Treasury, Bangalore, can be legally treated as unstamped in Mysore."

When the case came on for hearing before this court, the parties, who had due notice, did not appear in person or by advocate. We have therefore to decide the case without hearing any arguments.

The document in question is engrossed on a stamp paper bearing the stamp of the "Government of Mysore." As it was issued for sale through the Resident's Treasury in the Civil and Military Station of Bangalore, it bears also the seal of the said Treasury. But it is, for all intents and purposes, a Mysore Government stamp paper. Whether the value of Mysore Government Stamps issued by the Mysore Government for sale through the Resident's Treasury in the Civil and Military Station of Bangalore is credited to the revenue of Mysore or to a separate head, "Revenues of the Assigned Tract", is a matter for adjustment between the Government of India and the Mysore Durbar. It is immaterial for the purpose of determining the question before us. We are not aware of any Notification having been issued by the Government of Mysore, prohibiting the use of the Mysore Government Stamps sold in the Civil and Military Station for documents in

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the territories of Mysore outside the limits of the tract assigned to the British Government for purposes of a Cantonment. The said Civil and Military Station still forms part of Mysore, though it has been assigned, free of charges, to the exclusive management of the British Government; and so long as there is no alteration in the stamp law prescribing the Government of India Stamps for use in the said station and so long as the Mysore Government Stamps are sold in the said station, without a prohibition to use them outside the limits of the said station, if bearing the seal of the Resident's Treasury, I think such stamps bearing the inscription of the Government of Mysore and being of the proper value and description under the Stamp Act in force in Mysore may be used anywhere within the territories of Mysore and that documents engrossed on such stamps must be regarded as having been *duly stamped* within the meaning of ss. 33 and 34 of the Stamp Act.

All stamps issued by the Mysore Government through its Superintendent of Stamps bear also the seals of the different Treasuries through which they are sold. In the same manner, stamps forwarded to the Resident's Treasury bear the seal of that Treasury, but that would not render the stamps of no value, if purchased and used in any other part of Mysore. For the foregoing reasons, I would answer the question put by the sub-judge in the negative.

KRISHNA MURTI, J.—I am also of the opinion that the question submitted for the decision of this Court must be answered in the negative.

For the purposes of this reference, it is unneces-

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sary to refer to any arrangements made between the Mysore Durbar and the British Resident for the management of the assigned tract, going by the name of the Civil and Military Station of Bangalore. We have no information as to what is done with the stamp duty levied in such tract, and the question is not quite relevant. The practice there is analogous to that obtaining elsewhere in the territories of Mysore and we have only to see whether, as required by s. 9 of the Stamp Act (I of 1879), the duty with which the instrument is chargeable has been paid in the manner therein laid down. The seal of the Resident's Treasury indicates that the paper has passed through that Treasury, but the more important seal of the Mysore Government, which has been impressed on the paper, shows that it has been issued by that Government and that, by its sale, the required duty of four annas has been levied to the satisfaction of the stamp law of that Government. It has not been pointed out that any rule or direction of the Government has been violated by the party concerned, either in buying the paper where it was bought, or in engrossing on it the document evidencing the contract between the parties. The instrument which was in accordance with the stamp rules ought to have been admitted without any penalty having been levied thereon.

RAMACHENDRA IYER, J.—I concur.

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Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893. *June* 19.

MUSTOORAPA (PLAINTIFF) *v.* VENKATAPA (DEFENDANT).*

Stamp Act (I of 1879) s. 50—Reference by Collector as to nature of document—Proper object of reference under the Stamp Act.

The object of s. 50 of the Stamp Act (I of 1879) is to obtain a declaration as to the proper amount of duty or penalty payable on a document, not to determine the nature of the instrument. A reference the object of which is to elicit the opinion of the court as to whether a document is a promissory note or not, does not come within the purview of the section and cannot be entertained.

The Full Bench of the Chief Court (THUMBOO CHETTY, C. J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) pronounced the following opinion:—

In a Civil suit before the Sub-Judge of Bangalore, the plaintiff based his claim on a document, of which the following is a translation:—

"Receipt dated 3rd November 1892, in favor of Mustoorapa, son of Palesime Vakkaligar Venkatasubana, residing at Dodda Mavalli, by Venkatapa, son of Jotinapara Chandri Dasapa at Bangalore. I have this day purchased from you a pair of white bullocks for Rs. 65 after settling the bargain. I shall pay the said Rs. 65 by the end of November and shall take back this receipt. Thus runs the receipt."

The Sub-judge treated the document as a bond and levied a duty of eight annas with the prescribed penalty.

The Deputy Commissioner (Collector) of Banga-

*Civil Reference No. 4 of 1893 made by Mr. Sujayet Ali, Deputy Commissioner of Bangalore, in O. S. No. 363 of 1893, dated the 30th day of May 1893.

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lore makes this reference under section 50 of the Stamp Act. He states that the document, not being attested, is not a bond and the language is not that of a bill of exchange or promissory note, but it may be regarded as an agreement not otherwise provided for by the Act and is, under Art. 5 *(c)* of Sch. I, liable to a duty of eight annas, which is the duty actually levied by the Sub-judge.

The object of this reference is to elicit the opinion of this court, as to whether the document is a promissory note or not.

Section 50 has been enacted for the protection of the revenue. According to the Deputy Commissioner's own view, the document is an agreement and the highest duty payable to Government has been levied by the Sub-judge. This reference was therefore unnecessary, as no declaration is needed determining the amount of duty or penalty payable on the document. Section 50 does not apply to the case of an instrument of any of the classes excepted in the first proviso to s. 34 of the Act, and, as the Deputy Commissioner himself states that the document in question is not a promissory note but must be treated as an agreement and that no higher duty and penalty than those levied by the Sub-judge are payable, this reference cannot be entertained, as it does not come within the purview of s. 50. It is only when a Collector is of opinion that a court had wrongly admitted any instrument in evidence as duly stamped, or as not requiring a stamp, or upon payment of duty and a penalty which is less than the prescribed duty or penalty that a reference is admissible under s. 50, so as

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to obtain a declaration as to the proper amount of duty and penalty that ought to be levied. As no such declaration is called for in this case, the Deputy Commissioner had no power to make this reference.

No Order.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893 August 21.

HANUMANTHA ROW (PLAINTIFF) v. MUNISAMI (DEFENDANT).*

Code of Civil Procedure (Act X of 1882) ss. 257A and 258—Contract Act (IX of 1872) ss. 62 and 63—Satisfaction of decree not certified—Enforcement by suit of bond taken for decree.

Where a decree-holder took from his creditor a bond for the amount of his decree it was *held* that such bond was not void by reason of satisfaction of the decree not being certified to the court nor was there any bar to its being sued upon, under s. 257A and 258 of the Code of Civil Procedure.

The facts sufficiently appear from the Order of Reference which was as follows :—

This is a suit on a bond for Rs. 30, dated the 7th November 1891, and which was executed for a sum of money due on the decree in No. 2038 of 1890 of this court in favor of the plaintiff against the defendant. It stipulates that the amount should be discharged by the defendant working under the plaintiff and in case of default, the defendant should pay the plaintiff a penalty of half a rupee a day; or if he absolutely failed to work, he should pay interest at 24 per cent. The question is whether this contract is not void under s. 257A of the Civil Procedure Code.

The Calcutta High Court is in favor of the plaintiff, restricting the interpretation of the section by holding that, from its position, it should be construed to apply only to cases in which execution is sought of the agreement without fresh suit, and not to a fresh suit. *Hukum Chand Oswal* v. *Taharunessa Bibi*(1). The Bombay Court is of a different opinion. *Vishnu Vishwanath* v. *Hur Patel*(2). The reasoning of the Calcutta High Court does not seem conclusive,

* Civil Reference No. 3 of 1893 made by Mr. H. V. Nunjundaya, Sub-Judge of Bangalore, in O. S. No. 282 of 1893, dated the 8th day of April 1893.

(1) I. L. R. 16 Cal., 504. (2) I. L. R. 12 Bom., 499.

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as there seems to be no rule that provisions of substantive law should not be introduced in the midst of rules of procedure, and as a matter of fact other instances can be quoted of this having been done. Moreover the Procedure Code does not seem to make provision for any such agreements being enforced without separate suit, and in the absence of such a general provision, it cannot be right to hold that this is introduced as an exception to it.

I have not been able to refer to the Statement of objects and reasons for the introduction of s. 257A. It seems to me that it was meant to prevent a creditor who had obtained a decree from taking undue advantage of his position in exacting usurious interest, &c. This object would best be served by interpreting the section in its usual sense. The Bombay ruling, therefore, seems to be preferable.

The only case on this section decided in Mysore seems to be that of *Chick Venkatappah* v. *Mooneappah*(1). The first paragraph of this section only was considered in that case and the Chief Court held that the agreement fell not under this section but under s. 258. But this case seems to fall exactly under the second paragraph. The decree in 2038 of 1891 was not pronounced by me; but it is not contended that it allowed any interest. The words of the section are very general and include cases in which the excess is rendered payable even indirectly. My opinion, therefore, is, that, under this section the agreement sued on is void and cannot be enforced.

Taking however the importance of the question and the opinion of the Calcutta High Court into consideration, I resolve to submit this question for the decision of the Chief Court under s. 617 of the Civil Procedure Code.

The question to be submitted is—Whether the agreement in question is void and unenforceable under the second paragraph of s. 257A of the Civil Procedure Code?

Mr. *S. Subaraya* for the plaintiff.

The Full Bench of the Chief Court (THUMBOO CHETTY, C. J., RAMACHENDRA IYER and KRISHNA MURTI, JJ.) pronounced the following opinions:—

KRISHNA MURTI, J.—I understand that the decree referred to is still enforceable and that its final adjustment has not been certified to the court which passed it. Nor has that court sanctioned the agree-

(1) 14 M. L. R., 89.

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ment now sought to be enforced. The question now submitted for the decision of this court is, whether s. 257A of the Code of Civil Procedure is a bar to the judicial enforcement of the agreement sued upon.

After very careful consideration, I have come to the conclusion that the question should be answered in the negative. I may, before proceeding further, state that the amendment of s. 258 of the Civil Procedure Code does not seem to have any bearing upon the rule of law contained in s. 257A (*Swamirao Narayan Deshpande* v. *Kashinath Krishna Mutalik Desai*(1)) and that we should be guided by general principles of construction in arriving at a proper interpretation of it.

There is no doubt that the parties intended the agreement now sued upon to operate as a complete satisfaction of the decretal obligation, although they have not followed fully the procedure laid down for carrying out this intention effectually. The result of this omission will be that, if the decree-holder sues out execution, the agreement cannot be pleaded as a bar to execution, and the court which passed the decree or which may have to execute the decree will be legally disabled from taking notice of such satisfaction. Although, on the happening of such a contingency, the party against whom the decree will be executed will have the right to sue for damages and abide the uncertain result of such a suit, yet it cannot be denied that he will have been subjected to two different subsisting obligations, *viz.*, one under the judgment and the other under the agreement. But

(1) I. L. R. 15 Bom., 419.

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this is a hardship created by the carelessness of the party concerned. It is by no means certain that, if the judgment, for the satisfaction of which the agreement in question came into existence, is executed, the claimant under the agreement can successfully meet the objection of failure of consideration, should he file an action on such agreement after the decree is executed. But, if a decree is obtained on the agreement while the other decree continues to be enforceable, there will be two judgment-debts in the place of one. It is thus clear there will be anomaly and hardship, but they are of the party's own creation, and s. 257A was not intended to remove them.

Then again, let us assume that, under s. 258, satisfaction of the decree had been certified to the court. It cannot be contended that the court would have any power to judge of the reasonableness or otherwise of the adjustment, if both the parties have agreed to it. If a court then is bound to record, under s. 258, satisfaction or adjustment, partial or entire, certified to it, without having any power to consider its reasonableness, why should we suppose that the legislature intended to give it such power, simply because the parties do not report satisfaction to the court but accept the risk of keeping the judgment open for execution? There is no reason whatever in support of such contention and it must be held that, if, in satisfaction of a decree, any other contract is substituted between the parties without the intervention of the court, there is nothing to make such contract illegal or void. The agreement also seems to fall under s. 258 and not under 257A.

The question thus considered resolves itself into

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HANUMANTHA ROW v. MUNISAMI.

one of the capacity of parties to terminate one contract by the substitution of another. The law applicable to the subject is to be found in s. 62 of the Contract Act. The next section (63) is also allied to the subject.*

These are two rules of substantive law defining the rights of parties to a contract to enforce it and do not in any manner control or restrain the freedom of parties in entering into or performing such contracts privately. The legislature would, no doubt, have given clear indication of its intention, if such freedom was to be restrained by the intervention of a court, when the contract is on the face of it perfectly lawful and does not violate any principles of law. It may not be out of place to state that the rule contained in s. 63 seems to be in advance of the English law on the subject, which requires that, for the acts specified in s. 63 some consideration was necessary, on the principle that one party should not incur detriment without some corresponding benefit. But it was deemed by the framers of the Contract Act that the English rule carried the principle of consideration to an unreasonable extent and the outcome was the rule contained in s. 63. (*See* Sutherland's Contract Act, p. 138). Such being

* Indian Contract Act (IX of 1872) s. 62—

"If the parties to a contract agree to substitute a new contract for it, or to rescind or to alter it, the original contract need not be performed."

Section 63—

"Every promisee may dispense with or remit wholly or in part the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

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the advanced notions of Indian legislators, we must be content to ascertain their intention by the words used by them and not be very ready to impose unnecessary restraints upon the freedom of action of contracting parties.

The judgment of a court of justice is nothing more than the highest form of a contract (Addison on Contracts, 6th edition, p. 48) and the enabling provision of the substantive law contained in s. 62 of the Contract Act applies to the obligations created by such contract and regulates their satisfaction also. If any modification was intended, surely the proper place for the insertion of such modification was in the Contract Act itself. The mode of carrying out the substitution or novation of a contract may be considered as belonging to the province of Adjective Law, like the Registration and Evidence Acts, the Code of Civil Procedure, &c., but the modification itself of the power or capacity for such substitution or novation must find a place in Substantive Law. In such a matter as this, it is unreasonable to contend that the court has power to control the contracting capacity of the parties and the absence of any provision of this nature in the Contract Act may be viewed as an indication of the intention of the legislature not to give the court any such power.

The view taken of s. 257A by the Calcutta High Court, in *Hukum Chand Oswal* v. *Taharunnessa Bibi*(1) commands my respect and concurrence. The section from its place in the Code lays down a substantive prohibition in an adjective law,

(1) I. L. R. 16 Cal., 504.

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which can only deal with remedies and not substantive rights. It is not correct to construe the prohibition as referring to the right. It has reference to the remedy. If the parties contracting under s. 257A have it in their contemplation to keep open the remedy available to them under the judgment or decree then the law says that the specified modifications of a right imposed by the decree should receive the sanction of the court which passed the decree. The limited prohibition thus raised has reference to the executing of the decree itself and not to the substitution of a new contract which, while extinguishing the right and the remedy enforcible under the decree, gives rise to new rights and liabilities which in themselves form new grounds of action. The original right of action, which was crystallised by the decree, does not revive, but is altogether extinguished and in its place a new right and a new cause of action spring up. This is substantively declared and laid down by s. 62 of the Contract Act and cannot be restricted or modified by the rule of procedure contained in s. 257A of the Code of Civil Procedure.

The answer to the question submitted by the Subjudge is, that the contract sued upon is not void.

THUMBOO CHETTY, C. J.—There were conflicting decisions on the meaning of ss. 257A and 258 of the Code of Civil Procedure relating to payment or adjustment of a decree which was not certified to or sanctioned by the court, prior to the amendment by the legislature of s. 27, Act VII of 1888 (*See* Mysore Regulation VII of 1893, s. 26); but all doubts and difficulties have now been set at rest by the amend-

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ment aforementioned, which is to the effect that, "unless such payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by any court executing the decree.

There is nothing to prevent the parties to a decree from entering into a fresh contract for the payment of the debt, or the decree-holder from accepting a bond from the judgment-debtor for the decreed amount, in which case a fresh suit on such bond would lie, though the court executing the decree cannot recognise the fresh agreement or bond which was not certified to or sanctioned by such court. The judgment-creditor can certify the adjustment whenever he likes, and s. 258 of the Civil Procedure Code is no bar to his suing on the fresh contract. *Sellamayya* v. *Muttan*(1). If, notwithstanding the acceptance of the bond by the creditor in lieu of the decree, he enforces the decree, the debtor may sue to recover back from the creditor the money realized in execution of the decree with such damages as he might have sustained by reason of the wrongful act of the creditor. *Hukum Chand Oswal* v. *Taharunnessa Bibi*(1). The Bombay High Court, which took a different view prior to the passing of s. 27 of Act VII of 1888, conceded in the later case of *Swamirao Narayan Deshpande* v. *Kashinath Krishna Mutalik Desai*(2) that, since the amendment made by the above section, s. 258 is no bar to a suit based upon an adjustment not certified to the court executing the decree. The section (258), as now amended, is free from ambiguity, and the Sub-

(1) I. L. R. 12 Mad., 61. (2) I. L. R. 15 Bom., 419.

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judge will be informed that the bond sued upon is not void and that the objection to its reception under s. 258 of the Civil Procedure Code is untenable.

RAMACHENDRA IYER, J.—I agree in the opinion which has been given by my learned colleagues, to the effect that the bond sued on is not void, and that the suit is maintainable.

Right of suit upheld.

Before A. Ramachendra Iyer, Offg. Chief Judge, P. N. Krishna Murti, Judge and C. Meenacshaya, Offg. Judge.

1893 *Sept.* 18.

KRISTNAPA (PLAINTIFF) v. NARANAYA (DEFENDANT).*

Mysore Land Revenue Code (Regulation IV of 1888), s. 221—Bar to civil suit—Shanbog's office.

The Mysore Land Revenue Code (Regulation IV of 1888), s. 221, is no bar to the cognizance by the civil courts of a claim for share of the income of a Shanbog's office, such claim being apparently founded upon a contract or some family arrangement.

The question referred by the Sub-judge of Bangalore for the decision of Chief Court was—

"Whether in a suit to recover a share of the income of a Shanbog's office, the civil courts have jurisdiction, regard being had to the provisions of s. 221 of the Revenue Code."

The Full Bench of the Chief Court (RAMACHENDRA IYER, *Offg.* C. J., KRISHNA MURTI, J. and MEENACSHAYA, *Offg.* J.) pronounced the following opinion:—

There is no room for the contention that s. 221

* Civil Reference No. 2 of 1893-94 made by Mr. H. V. Nunjundaya, Sub-judge of Bangalore, in O. S. No. 85 of 1893-94.

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of the Land Revenue Code* is a bar to the cognizance of this suit by a civil court. The plaintiff's claim is apparently founded upon a contract, or some family arrangement. He is willing to stand by that contract or arrangement, and he seeks to enforce the right which he has acquired under it. If the plaintiff has been excluded from the performance of the office, it is with his own consent. He does not treat

* Section 221. *Bar of certain suits.*—Subject to the exceptions hereinafter appearing, and except as hereinbefore expressly provided, no civil court shall exercise jurisdiction as to any of the following matters :—

(*a*) Claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized by Government or of any other village officer or servant; or

claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service; or

suits to set aside or avoid any order relating to such office or service or such officer or servant, which may be passed by Government, or any officer duly authorized in that behalf; or

claims against Government relating to lands declared by Government, or any officer duly authorized in that behalf, to be held for any service whatsoever;

(*b*) Objections :—

to the amount or incidence of any assessment of land revenue authorized by Government, or to the mode of assessment, or to the principle on which such assessment is fixed; or

to the validity or effect of the notification of survey or settlement, or of any notification determining the period of settlement;

(*c*) claims connected with or arising out of any proceedings for the realization of land revenue, or the rendering of assistance by Government, or any officer duly authorized in that behalf, to superior holders for the recovery of their dues from inferior holders; or

claims to set aside on account of irregularity, mistake or any other ground except fraud, sales for arrears of land revenue;

(*d*) claims against Government—

(1) to be entered in the Revenue Survey or Settlement records,

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it as an injury to his right, and he does not claim compensation. Whether a suit for division of emoluments ought to be decreed, and whether the con-

or village papers as liable for the land revenue, or as superior holder, inferior holder, occupant or tenant; or

(2) to have any entry made in any record of a Revenue Survey or Settlement; or

(3) to have any such entry either omitted or amended;

(e) the distribution of land or allotment of land revenue on partition of any estate under Bombay Act IV of 1868, or under this Regulation, or under any other law for the time being in force;

(f) claims against Government to hold land wholly or partially free from payment of land revenue; or to receive payments charged on or payable out of the land revenue; or

to set aside any cess or rate authorized by Government under the provisions of any law for the time being in force; or

respecting the occupation of waste or vacant land belonging to Government;

(g) claims regarding boundaries fixed under Bombay Act I of 1865 or under this Regulation or under any other law for the time being in force, or to set aside any order passed by a competent officer under any such law with regard to boundary marks:

Proviso.—Provided that if any person claim to hold land wholly or partially exempt from payment of land revenue under

(h) any enactment or rules having the force of law for the time being in force expressly creating an exemption not before existing in favor of an individual, or of any class of persons, or expressly confirming such an exemption on the ground of its being shown in a public record, or of its having existed for a specified term of years; or

(i) any written grant from the Government expressly creating or confirming such exemption;

Such claim shall be cognizable in the civil courts.

Illustrations to (h).

(1). It is enacted that when a specific limit to assessment has been established and preserved, the assessment shall not exceed such specific limit. A is the owner of land worth Rs. 100 for assessment. He claims to be assessed at Rs. 50 only on the strength of a course of dealing with him and his predecessors under which his land has not been more highly assessed. There is

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tract, if any, is not opposed to public policy, may have to be determined by the judge; but there is no reason for declining to entertain the suit.

Right of suit upheld.

no exemption not before existing created by enactment, and A's claim is not cognizable in a civil court.

(2). It is enacted that land revenue shall not be leviable from any land held and entered in the land register as exempt. A claims to hold certain land as exempt on the ground that it has been so held by him and is so entered in the land register. This is an exemption expressly confirmed by enactment on the ground of its being shown in a public record, and A's claim is cognizable in a civil court.

(3). It is enacted that the Deputy Commissioner shall confirm existing exemptions of all lands shown in certain maps to be exempt. A claims exemption alleging that his land is shown in the maps to be exempt. A's claim is cognizable in a civil court.

(4). It is enacted that assessment shall be fixed with reference to certain considerations and not with reference to others. This is not an enactment creating an exemption in favor of any individual or class and no objection to an assessment under such an enactment is cognizable in a civil court.

(5). It is enacted that, in the event of the proprietary right in lands, the property of Government, being transferred to individuals, they shall be permitted to hold the lands for ever at the assessment at which they are transferred. The proprietary right in certain lands is transferred to A at an assessment of Rs. 100. An exemption from higher assessment not before existing is expressly created in favor of A by enactment, and he may seek relief in the civil court against over-assessment.

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Before A. Ramachendra Iyer, Offg. Chief Judge and C. Meenacshaya, Offg. Judge.

1893 October 14.

TIMAPA (PETITIONER) *v.* VENKATARAMANAIYA AND OTHERS (RESPONDENTS).*

Court-fees Act (VII of 1870), sch. II, art. 1—Application for a certificate of sale.

An application in writing for a certificate of sale should be stamped as an application or petition under the Court-fees Act (VII of 1870) sch. II, art. 1.

This was a Reference under s. 617 of the Code of Civil Procedure in which the Sub-judge of Bangalore asked for decision of the question—

"Whether an application in writing for a certificate of sale should be stamped or not?"

The Chief Court (RAMACHENDRA IYER, *Offg.* C. J. and MEENACSHAYA, *Offg.* J.) pronounced the following opinion :—

It is not quite clear what the judge means by "an application for a certificate of sale:" whether an application for a certificate to be prepared in accordance with the order of confirmation, or an application for a copy of a certificate. If, as we think, the judge means an application for a copy, we do not see why it should not be stamped under the last para. of cl. *(a)* of sch. II, art. 1 of the Court-fees Act (VII of 1870).

* Civil Reference No. 1 of 1893-94 made by Mr. H. V. Nunjundaya, Sub-judge of Bangalore, in O. S. No. 1319 of 1892.

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CIVIL REVISIONS.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893 June 21.

MAHOMED HUSSAIN AND ANOTHER (DEFENDANTS) *v.* ALARIKA GOOLAM HUSSAIN SAIT (PLAINTIFF).*

Code of Civil Procedure (Act XIV of 1882) Chap. XXXVII—Reference to arbitration—Vagueness of reference—Acquiescence—Finding as to costs—Power of court to appoint new arbitrator—Irregularities—Misconduct.

In a partnership suit, it was referred by the court at the request of the parties under Chapter XXXVII of the Code of Civil Procedure to five arbitrators, one of whom was called also "umpire", to take accounts and decide on the respective liabilities of the parties.

Objection was taking to the award on the ground that (1) the reference was illegal and void on account of the vagueness of its terms, (2) the decision as to costs was beyond the scope of the reference, (3) the court had no power to appoint an arbitrator in place of one (the so-called umpire) who had retired and (4) the arbitrators were guilty of misconduct (*a*) in not thoroughly examining the accounts (*b*) in not all meeting together to discuss the award and (*c*) is not all signing the award together.

It was *held* that (1) although the demand for judgment covered a wide ground, the parties narrowed their differences on the reference to an examination of accounts by the arbitrators and a finding as to the respective liabilities of the partners and the court the parties and the arbitrator understood the reference as such and acted accordingly. Even if there was anything objectionable in this part of the case, the defendants stood by and acquiesced in the arbitration by submitting to its enquiries and to the examination of accounts by the arbitrators; (2) even granting that the recommendation about the costs of suit was not within the scope of the reference, the objection would be a ground for modifying the award under s. 518 of the Code of Civil Procedure and not for vitiating it *ab initio*. It is not an irregularity which goes to the root of the question and does not prejudice either party materially; (3) the Sub-judge was quite within his powers when he decided to continue the arbitration and to appoint a successor of the umpire and (4) the acts alleged against the arbitrators were not such irregularities as would vitiate the award.

* Civil Revision Petition No. 20 of 1893 against original decree No. 42 of 1892 of Mr. M. Ramaswami Iyer, Sub-judge of Mysore, dated the 9th day of February 1893.

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MAHOMED HUSSAIN v. ALARIKA GOOLAM HUSSAIN SAIT.

Messrs. *S. Ramaswamier* and *Mahomed Ahmed* for the defendants (petitioners).

Messrs. *Bashyam Iyengar, Narayana Row* and *Rangiengar* for the plaintiff (counter-petitioner).

The Order of the Chief Court (RAMACHENDA IYER, and KRISHNA MURTI, JJ.) was as follows:—

This case was argued at very great length and much latitude was given to the learned advocates for the petitioners, both of whom addressed the court and supplemented each other's arguments.

The petition is to revise the judgment of the Sub-judge of Mysore, given in accordance with an award under Chap. XXXVII of the Code of Civil Procedure; and the grounds urged are the same as were fully considered by the Sub-judge. It may, *in limine*, he observed that the Sub-judge has written a carefully considered judgment, in which he has correctly discussed the points raised in this petition.

The facts of the case are fully set out in the judgment appealed against, and to repeat the same briefly here, the suit was filed for dissolution of a partnership entered into between the parties, for an examination of accounts, and for an adjudication as to and recovery of, what each partner owed to the other. The suit was in due course posted for the settlement of issues, but, before the date arrived, the parties filed an application to the court requesting it to refer the matter to the decision of five arbitrators, one of whom was called also an umpire. These arbitrators and umpire were named, and provision was also made in the application for the appointment of new arbitrators by the umpire, in the event of any vacancies occurring among them before

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the matter was finally decided. The court thereupon passed an order referring the case to the arbitrators and they entered upon their duties. After one or two sittings, Mr. *Raja Row*, who was the umpire, wanted to withdraw from the arbitration and, in permitting him to do so, the court appointed Mr. *Sheshagiri Row*, Munsiff of Mysore, to succeed him. In doing so, it may be mentioned that the court refused to recall the case for its own decision as prayed for by the defendants, and the selection of Mr. *Sheshagiri Row* did not meet with the express approval of them. The arbitrators proceeded to judgment, and four of them including the umpire gave an award, which was however dissented from by the fifth arbitrator. The decree is in accordance with this award of the majority so far as the result of the examination of accounts and the consequent liability of the defendants to pay the decreed amount to the plaintiff go.

We have now to see, whether the petitioners have made out any grounds for our interference. The first ground relied upon by them is, that the reference is illegal and void on account of the vagueness of its terms.

The law on the subject is very clear. Section 506 of the Code of Civil Procedure requires that "every such application shall state the particular matter to be referred." Section 508 directs the court to refer, by order, to the arbitrators, "the matter in difference which they are required to determine."

Both the application and the order of the court are before us. The former is as follows:—

"In order to examine the account and give an award in this

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complicated case, the parties have met together and appointed arbitrators and umpire. * * We shall accept the decision of the majority. We shall have no objection to a decree being given by this court in accordance with the decision of the said arbitrators."

The latter is in the following words:—

"As desired by the parties and their counsel, the case is referred to arbitration under s. 508 of the Civil Procedure Code. The arbitrators are allowed one month's time to submit their award."

Reading these two documents with the plaint, it will be noticed that, although the demand for judgment covered a wide ground, such as dissolving partnership, &c., the parties narrowed their difference to an examination of accounts by the arbitrators and a finding by them as to the respective liabilities of the partners. So far therefore the requirement of s. 506 already quoted was fully complied with, and the court referred that difference for the determination of the arbitrators. They understood what they were called upon to decide, and the award does not go beyond the fixing of the defendants' liability to pay the plaintiff the sum of money which was the balance struck in his favor by the arbitrators, after an examination of accounts. No vagueness such as has placed the matter beyond the range of comprehension of either the court, or the parties, or the arbitrators, can be perceived, and the objection taken is futile. This is not a case where the whole plaint was referred bodily to the arbitrators and that question does not seem to arise in the suit. The application specifically narrows the reference to the examination of accounts, and both the court and the arbitrators understood the reference as such and acted accordingly. There

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is nothing to vitiate the reference; and, even if there was an objectionable feature in this part of the case, the defendants stood by and acquiesced in the arbitration by submitting to its enquiries and to an examination of accounts by the arbitrators. Having done so, they cannot be permitted with any grace to vitiate the whole proceeding by an imaginary initial error as to vagueness in the reference. This objection must be disallowed.

Another objection which was allied to this vagueness and which may be conveniently disposed of here was, that the recommendation in the award about costs was beyond the scope of the reference so as to vitiate the award. The learned counsel for the plaintiff referred to the Forms of reference appended to the Code of Civil Procedure (Nos. 170 and 171) wherein the costs of reference are provided for. Even granting that the recommendation about the costs of suit is not within the scope of the reference, the objection would, as pointed out by the learned counsel, be a ground for modifying the award under s. 518 and not for vitiating it *ab initio.* It is further an irregularity which does not go to the root of the question and does not prejudice either party materially. This ground is therefore not sufficient to cause the award to be set aside by a court of revision and must be disallowed also.

In connection with this ground, it was urged in the lower court, that the recommendation about costs indicated the partiality of the arbitrators, but the learned advocates for the petitioners, with great propriety, abandoned all the frivolous statements affecting the moral conduct of the arbitrators, and

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confined themselves to objections on the ground of misconduct only with reference to irregularities in procedure.

The next objection was, that the court had no power to appoint Mr. *Sheshagiri Row* in succession to Mr. *Raja Row.* This objection will, on careful consideration, be seen to be without any substantial basis. The law of reference to arbitration has been very clearly laid down in the Code of Civil Procedure. The first broad principle and the rule of law is, that a submission to arbitration must be entirely a voluntary act of the parties. The court has no power to control their action in originally making up their mind to submit to a reference. It is only if the parties voluntarily agree to seek such arbitration, that the court can refer the matter. It is likewise essentially within their discretion to name the arbitrators and the umpire. No court is at liberty to control their choice at this stage. It is only to arbitrators, of their free and voluntary choice, that a matter in difference between the parties can, at their request, be referred by a court. Section 507 provides for the possible contingency at this stage of an arbitrator nominated by the parties not agreeing to enter upon arbitration. Even at such a stage, the law does not give any power to a court of acting either without the consent of the parties or in opposition to their wish. The adjudication by this special *forum* is a thing of their own seeking, and the parties are given entire freedom and full discretion both to ask for it and to properly constitute it. Applying these rules to the present case, the Sub-judge has, in the initial stage of appointing the arbitrators and

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referring the matter in difference for their decision, committed no error. It is however contended that, When Mr. *Raja Row*, after acting as arbitrator for a short while, withdrew from his office, the court had no power to appoint Mr. *Sheshagiri Row* as his successor, without the consent of the parties. Before considering the law of the case, it may be observed that the facts give no room for such contention. Mr. *Bashyam Iyengar* construed the application for reference as containing nothing personal to Mr. *Raja Row*. This construction is sound. If the parties had it in their minds that Mr. *Raja Row* was indispensable during the continuance of the arbitration, there was nothing to have prevented them from expressly stating so in the application. They provided for the appointment of arbitrators when vacancies occurred, and if it was their intention to make a reservation in their own favor in regard to the umpire also, they would not have failed to add a condition to meet such a contingency, the possibility of which was as clear as in the case of arbitrators. They failed to say anything on the point, and the legitimate inference to be drawn therefrom is, that they left it to the operation of law and to the discretion of the court. Moreover it is, as pointed out by the learned counsel for the plaintiff, very significant that the person to appoint a successor to a withdrawing arbitrator is not Mr. *Raja Row* but the "*umpire*," whoever he may be. This exposition of the facts of the case makes it very clear that it was not the intention of the parties to override the operation of law in this respect, and it is not necessary therefore to discuss the question as to whether they

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may do so. Suffice it to say that they did not, and the law under such circumstances (s. 510) gives the power to the court to appoint a successor. What a court may not do at the initial stage, the law says, it may do when the arbitration has once formally commenced its work; and the incapacity of the one period should not be confused with the capacity to act of a subsequent period. It is through this want of classification that some decided cases inapplicable to the present case were quoted and they may be passed over. The court at this stage has the power either of appointing fresh arbitrators or of revoking the reference. The parties ought no doubt to be heard, but the decision to act either way rests entirely with the court. Reading ss. 510 and 508 together, there can be only one conclusion that, when once a matter is referred to arbitration, the court or the party has no power whatever to revoke it, and the former can do so only when the complement of arbitrators becomes deficient by the failure of one or more to act. The statute law itself is so clear on the subject that it is unnecessary to refer to the authorities quoted during argument. A private submission to arbitration founded upon the consent of the parties may not be quite analogous in every respect to a reference by a court, the procedure of which is regulated by statute law, but it will not serve the purpose of this suit to consider that question at any length. The Sub-judge was quite within his powers when he decided to continue the arbitration and to appoint a successor of Mr. *Raja Row*. This umpire was an experienced Munsiff of long standing, disinterested in the cause of either

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of the parties. Having such a man to guide and control the acts of arbitrators, who had already proceeded with the examination of accounts and heard the parties, the Sub-judge would not have acted with sound discretion, if he had withdrawn the case to be dealt with by himself. The examination of accounts required skill and it was conducted by experts who had been nominated the parties. The defendants did not urge any valid reasons for not continuing the arbitration, and the Sub-judge acted rightly in refusing to accede to the caprice of the party. It has been already shown that the parties made no personal reservation in favor of Mr. *Raja Row*, and the appointment of Mr. *Sheshagiri Row* to succeed him was at once perfectly legal and the exercise of the discretion entirely sound. These objections must also be over-ruled.

Coming now to the vague charge of misconduct, the defendants have been shifting their ground like a migrating sand-hill. The Sub-judge has in this respect also proceeded with laudable caution, for the pleader of the defendants is made to specify the acts constituting misconduct as having been "hurry, partiality, incomplete examination of the accounts and ignorance of the matter on which the parties were at issue." But before us, the learned advocates ignored all such acts and contended chiefly—

(1) that the examination of accounts was not thorough;

(2) that all the arbitrators did not meet together and discuss their award;

(3) that all of them did not sign the award together.

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The arguments were rather discursive and wanting in precision. The Sub-judge has in more than one place referred to the examination of accounts being thorough. Only one instance could be referred to when all the arbitrators were not present, and this was on the last occasion when they wanted to settle the award. The dissentient arbitrator was invited, but he did not attend. The other arbitrators wrote their award and sent it to the so-called umpire. He sent it to the dissentient arbitrator and he refused to sign it. The other four therefore signed the award. It is hard to see any irregularity in this proceeding, and without pausing to be so technical as to lay down that all the arbitrators must have signed the award in the presence of one another, it may be observed that in this case no irregularity such as should vitiate the award has been alleged and much less proved.

It seemed doubtful as to whether the value of *chendrahara* and precious stones referred to separately in the award was a matter to be evolved out of the examination of accounts, but it was explained that it was so and fell within the scope of the reference sought by the parties.

The objection taken in regard to the misconduct of the umpire is utterly baseless. He acted in conjunction with the other arbitrators, and for his own satisfaction went through the accounts also. He was not strictly an umpire such as is contemplated in the Code. Though the parties chose to call him an umpire, he was also an arbitrator and as such acted entirely within his right when he deliberated

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on the award and other matters conjointly with the other arbitrators. 1893

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For these reasons, the petition for revision must be disallowed and the same is hereby dismissed with costs.

It must be pointed out that the decree does not cover the whole of the demand for judgment in the plaint. The prayer was for a dissolution of partnership, appointment of a liquidator to realize the assets and pay off the liabilities and for the liabilities of the partners *inter se* to be ascertained. On the first two points, the decree is silent. But it has been represented that the partnership was practically dissolved years ago, and that there is no necessity for a receiver, as there are no assets or liabilities other than what has been decreed against the defendant in favor of the plaintiff. There seems to be no necessity to make any order in this respect.

Petition dismissed with costs.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

COOPOOSAWMY CHETTY (PLAINTIFF) v. RAMASWAMI IYER (DEFENDANT).*

1893. *June* 23.

Small cause suit—Decree on illegal evidence—Material irregularity—Revision.

Where the decree in a small cause suit was not supported by any legally proved or admitted evidence, and the judge acted upon a document not legally proved, it was *held* that his irregularity went to the very root of the case and vitiated the whole proceedings. Such a case was therefore a fit one for the exercise of revisional powers and the Chief Court set aside the decree and remanded the suit for re-hearing.

* Civil Revision Petition No. 41 of 1893 against S. C. decree No. 683 of 1892, of Mr. M. Ramaswami Iyer, Sub-Judge of Mysore, dated the 13th day of February 1893.

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COOPOOSAWMY CHETTY v. RAMASWAMI IYER.

Mr. *B. Nunjundapa* for the petitioner (plaintiff).

The Judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

This is a small cause suit which has come up before us on the revision side. On a perusal of the Sub-judge's judgment, it seemed to us, at the first blush, that we could not interfere with his finding which was to the effect that, sometime before the defendant was served with notice not to pay the rent now sued for to Nunjundia, the amount was paid to the latter. But, on looking over the proceedings, we find that this finding is not at all supported by any legally proved or admitted evidence. Nunjundia was not examined. The parties too were not examined. The receipt said to have been given by Nunjundia to the defendant was simply filed by the defendant's pleader. It contains no endorsement as to whether it was proved or admitted. No witnesses were examined by the plaintiff or the defendant. The receipt moreover is dated 10th June 1889, whereas it is alleged in the plaint that the notice to the defendant not to pay the rent was given on 5th June 1889, or five days prior to the date of receipt. If, subsequent to the issue of the notice, the defendant, in collusion with Nunjundia, fraudulently made the payment and obtained the receipt, that would not be binding on the plaintiff. There is further no proof as to the genuineness of the receipt or payment of the rent to Nunjundia. The Sub-judge has acted illegally and with material irregularity in basing his finding on a receipt which was neither proved nor admitted. Judicial proceedings ought to be conducted with the greatest preci-

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sion and regularity and, in small causes especially, judges are expected to be extremely careful in regard to both the admission and appreciation of evidence, as their decisions are final and the parties considering themselves aggrieved by such decisions will be left without remedy. The proceedings in this case show that the enquiry has been carelessly conducted, and the judge has acted upon a document which has not been legally proved. This irregularity goes to the very root of the case and vitiates the whole proceedings. We therefore consider this to be a fit case for the exercise of our powers of revision. We set aside the Sub-judge's judgment and direct him to restore the suit to his file and re-investigate and dispose of the same on the merits. The costs of this reference will be costs in the cause and abide the fresh decision of the Sub-judge.

Decree set aside. Suit remanded for retrial.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893
June 26.

NADIG NARANAPA (PLAINTIFF) v. DASA AND ANOTHER (DEFENDANTS).*

Limitation Act (XV of 1877), s. 20—Interest—Appropriation of payments.

Where a sum of money was paid by a debtor to his creditor, which was not appropriated by the former to either principal or interest, both of which were due at the date of payment, *Held* that an appropriation by the creditor of the money so paid, to account of interest is not sufficient under s. 20 of the Limitation Act (XV of 1877) to prevent the debt from being barred. Under the section the interest must be paid as such: the debtor must know and intend that it is for the payment of interest that he gives the money.

* Civil Revision Petition No. 54 of 1893 against S. C. decree No. 657 of 1892, of Mr. J. E. Holt, Munsiff of Chickmagalur, dated the 20th day of February 1893.

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Mr. *L. Srinivasiengar* for the petitioner (plaintiff).

The Order of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

There seems to be no ground for the interference of this court.

The petitioner prays this court to exercise its powers of revision under s. 622 of the Code of Civil Procedure and set aside a decree of the Munsiff of Chickmagalur.

The suit was laid in that court for the recovery of a balance of debt and interest, on a written contract. As the sum sued for was less than fifty rupees, it was tried as a small cause, under the provisions of Act XI of 1865. The Munsiff framed two issues as to whether the consideration recited in the bond was true, and whether the defendants agreed to pay interest. His findings were in the negative, but neither of them has any material bearing on the result of the case. As a corrollary of his negative finding, regarding interest, the Munsiff held that the payments were intended to be appropriated as principal and, as the suit was filed more than three years after the date of the bond, he dismissed the suit as being barred.

The finding about consideration is binding on this court, and in the matter of interest it is obvious that the Munsiff was wrong in taking evidence in direct opposition to a material term of the written contract. It is, however, unnecessary to make more than this passing observation regarding it, as, in the right view which should be taken of this case, the finding becomes unimportant and also somewhat irrelevant.

The learned counsel for the petitioner seeks ex-

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emption from the Statute of Limitation, under s. 20 of the Limitation Act (XV of 1877), and argues that, at the time the payments relied upon by him were made, interest under the bond was due and that therefore the creditor was justified in viewing it as payment towards interest and appropriating it as such. This may be a very correct view, if regarded only from the stand-point of the law of appropriation. But, for the purposes of the Limitation Act, the contention itself removes the ground from under the feet of the learned counsel. The contention impliedly concedes that the debtor himself did not specify the mode of appropriation, but it was the creditor who exercised his privilege under the law and appropriated the money for interest. This is not sufficient to satisfy the requirement of s. 20. Under it, the interest must be paid as *such*. The debtor must know and *intend* that it is for the payment of *interest* that he gives the money. The reason of the law is clear. By the payment of interest, there is an implied acknowledgment of the debt itself, which is deemed sufficient to give the right a fresh starting period. The principle underlying this rule of law is, that the payment is equivalent to an acknowledgment by the person making it of his liability and an admission of the title of the person to whom the payment is made Simple payment unattended with any explanation, or a statement of the payer's intention, does not fulfil this purpose. The creditor cannot do what by the law a debtor is bound to do. The act of appropriation by the creditor is not sufficient to bring the case under s. 20 of the Limitation Act. The payer must have

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given the money as interest. Admittedly the payment was not made as interest, and the decision of the Munsiff, that the suit was barred, is, under these circumstances, correct. The Bombay High Court (Melville and Kemball, JJ.) adopted this view of the law in *Hanmantmal Motichand* v. *Rambabai* (1).

For these reasons, this petition is dismissed.

Petition dismissed.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 *November* 22.

VENKATACHAR (PLAINTIFF) *v.* VISHAKANTIA (DEFENDANT).*

Small Cause Court—Jurisdiction—Suit for produce—Dispute as to right to land.

Held, that where there are *bonâ fide* disputes as to right to land of which the plaintiff is not in possession, a suit by him to recover the produce or for damages for wrongful detention cannot be brought in the Small Cause Court.

Mr. *Singrachar* for Mr. *L. Srinivasiengar* for the petitioner.

Mr. *Sambasivia* for the counter-petitioner.

The Order of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

The records show that, with regard to the right to the land, there are *bonâ fide* disputes involving debatable questions of law. It is also very clear that the plaintiff has not obtained possession of the land the produce of which he claims. We are of opinion that this suit does not lie in a Small Cause Court. There is no contract betwen the parties and no breach of such contract is alleged as the ground

* Civil Revision Petition No. 130 of 1893 against S. C. decree No. 481 of 1891, of Mr. H. V. Nunjundaya, Sub-Judge of Bangalore, dated the 15th day of May 1893.

(1) I. L. R. 3 Bom., 198.

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of this action. Till the plaintiff establishes his right to the land, he will not be entitled to sue for any damages on the ground of wrongful detention. In either alternative, his suit to recover the produce does not lie on the small cause side, and the suit has been therefore properly dismissed. We decline to interfere, but in so doing we express no opinion on the observations made by the Sub-judge regarding the rules of the Revenue law on the subject. This application is rejected.

Application rejected.

CIVIL APPEAL.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

CHICKA LINGA GOWDA, (CREDITOR) v. SIDDARAJA URSOO (INSOLVENT).*

1893 Dec. 19.

Code of Civil Procedure (Act XIV of 1882) Chap. XX—Insolvency—Receiver—Mortgagee committing waste—Separate suit for compensation—Procedure.

In an insolvency under Chap. XX of the Code of Civil Procedure, one of the creditors, a usufructuary mortgagee who was in possession under a previous decree against the insolvent, felled trees on the mortgaged lands, and thereby diminished the value of the property. An order was made by the judge in insolvency, on a petition of the insolvent, that the amount of damage should be deducted from the amount due on the decree and the balance only be declared as the creditor's claim against the estate. On appeal it was *held* by the Chief Court that, assuming the mortgagee had injured the estate, the question of compensation ought not to be determined by a separate suit. *Linganna* v. *Guru Siddapah* (15 M. L. R., 9) followed.

Also, the judge had power to determine the question in the exercise of his insolvency jurisdiction, but the application should have been made by the Receiver in his own name. As however in the

* Appeal No. 44 of 1893 against Order No. 461 of 1891 of Mr. M. Ramaswami Iyer, Sub-Judge of Mysore, dated the 4th day of November 1892.

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present case a *bonâ fide* mistake was made by the insolvent and the judge, and the Receiver was practically a party to the proceedings inasmuch as he stated in the lower court he had no objection to the enquiry, the irregularity of the procedure sanctioned by the court could not vitiate the order appealed against.

Mr. *Lawrance* for the appellant.

Mr. *S. Ramaswamier* for the Insolvent.

The facts of this case sufficiently appear from the Order of the Chief Court (RAMACHENDRA IYER, and KRISHNA MURTI, JJ.) which was as follows :—

In O. S. No. 54 of 1886 on the file of the Subordinate Judge of Mysore (*Chicka Linga Gowda* v. *Chicka Raja Ursoo*) the defendant was directed to pay a sum of money to the plaintiff (present appellant), and the decree-debt was made a charge upon the lands which were in the plaintiff's possession.

Two years afterwards, the defendant above-named applied to be declared an insolvent and included the decree-holder, Chicka Linga Gowda, among his creditors. By his order dated 8th November 1888, the Subordinate Judge declared him an insolvent and appointed the Nazir of the court to be Receiver.

On 13th November 1891, the insolvent informed the Subordinate Judge that the creditor, Chicka Linga Gowda, had, subsequently to the date of the decree, unlawfully felled trees which were on one of the mortgaged lands, and thereby diminished the value of the property. He prayed that the damage might be assessed, that the amount of damage might be deducted from the amount decreed to the plaintiff in O. S. No. 54 of 1886 and that it might be declared that the balance was all that was due to the plaintiff on account of his decree. The Subordinate

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Judge made an order accordingly. The decree-holder has appealed from the order.

The first question of law which was argued was whether, assuming that the mortgagee had injured the estate, the question of compensation ought not to be adjudicated in a separate suit. We had to discuss the question in our judgment in *Linganna* v. *Guru Siddapah*(1). We referred to all the authorities bearing on the point and we arrived at the conclusion that the question ought to be determined in execution of the decree and not by a separate suit. We see no reason to question the correctness of that decision.

The next point which was argued was, whether the Subordinate Judge had power to determine the question in the exercise of his insolvency jurisdiction, and whether the application ought not to have been made by the Receiver. The Subordinate Judge, who appointed a Receiver who took charge of the estate for the benefit of the creditors, was bound to ascertain the debts which were due by the insolvent, to collect the moneys which were due to him and to make a distribution among all the creditors according to the provisions contained in s. 356 of the Code of Civil Procedure. It was his duty to see that no fictitious debts were entered in the schedule and that no creditor was paid more than he was lawfully entitled to recover. That being the scope of his authority and the question of compensation being one which had to be determined in execution, the Subordinate Judge was perfectly right in commencing

(1) 15 M. L. R., 9.

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an enquiry with a view to ascertain whether the creditor was entitled to claim the amount of his decree or any smaller amount. While we are prepared to agree thus far in the opinion of the Subordinate Judge, we do not agree in the opinion that the insolvent was right in making an application in his own name for an enquiry into the conduct of the decree-holder. The order for the appointment of a Receiver operated to vest in him the insolvent's estate and he succeeded to all the rights and liabilities of the latter. If money was due to the estate, he was entitled to recover it and he also was the person whose duty it was to arrange for payment of the debts which were due by the estate. If he was remiss in the discharge of his duty, the insolvent or any creditor who was interested in the matter might bring his remissness to the notice of the court; and the judge, whose officer the Receiver was, would be bound to enquire into his conduct and pass necessary orders for the protection of the estate. But all proceedings on behalf of the estate ought to be conducted by the Receiver in his official capacity. When the matter was brought to the notice of the Judge, he ought to have directed the Receiver to come forward as applicant. We do not however think that the irregular procedure which was sanctioned by the lower court vitiates the order appealed against. A *bonâ fide* mistake was made by the insolvent and the judge; but the Receiver was practically a party to the proceedings, for we note that he stated in the lower court that he had no objection to the enquiry which was set on foot by the insolvent.

We disallow the two legal objections which were

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urged by the appellant, and we direct that the appeal be posted for hearing on the merits, after substituting the name of the receiver for that of the insolvent.

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Legal objections disallowed. Appeal to be heard on merits.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

KASIPATHIA (DEFENDANT) v. VENKATACHARY (PLAINTIFF).*

1892 *June 3.*

Code of Civil Procedure (Act XIV of 1882) s. 244—Division of lands in execution of decree—Procedure.

Where, in execution of a decree for possession of certain lands' it was objected by the defendant that the plaintiff had been put in possession of lands other than he was entitled to under the decree and to a share of some of which the defendant was entitled, it was *held* that such questions should be decided, under the provisions of s. 244 of the Code of Civil Procedure, by order of the court in execution and not by separate suit.

Further, as it appeared there had been no proper division of the lands in accordance with the decree, the case was remanded for a fresh decision after the property had been surveyed and lists and plan prepared. The proper course to be adopted in such a case was indicated by the orders of the Chief Court.

Messrs. *Narayana* and *Nunjundapa* for the appellant.

Mr. *L. Srinivasiengar* for the respondent.

The following Orders were made by the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) :—

This appeal has been very imperfectly argued before us. We were surprised to find that the advocate for the appellant was not prepared to enlighten us on any of the points on which we en-

* Appeal No. 5 of 1892 against Order No. 1198 of 1886 of Mr. P. Singarachar, Munsiff of Bangalore, dated the 4th day of November 1891.

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KASIPATHIA *v.* VENKATA-CHARY.

tertained doubts. Before deciding this appeal we deem it essential to have before us a plan or sketch of the lands referred to in the schedule appended to the decree, and we direct the Munsiff to desire the Deputy Commissioner, under whose orders the division is said to have been effected, to have a plan prepared and submitted, showing the position, extent, &c., of the different lands which formed the subject-matter of the suit and indicating separately the portions or shares thereof which have been apportioned and put into the plaintiff's possession in accordance with the decree and according to the receipt *Ex. No. 1* obtained from the plaintiff, dated 26th May 1890. The extent, &c., of the lands specified in the schedule appended to the decree and of the portions actually put into the plaintiff's possession should be distinctly shown in the plan. Information should also be furnished as to the revenue, if any, payable to Government in respect of the suit-lands and in what manner it has been apportioned, to give effect to the decree.

A return to this order should be made within a month from the date of its receipt.

1892 *Sept.* 12.

As the Deputy Commissioner of Bangalore states that the village is an unsurveyed one and it would therefore take a long time to prepare a sketch, the reasonable expenses, incidental to the preparation of the plan and taking measurements, &c., will be paid by the appellant, and the Deputy Commissioner will be requested to make a return to the order of this court within six weeks from date of receipt of this

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order. A sum of Rs. 25 will be deposited in this court by the appellant within ten days from this date. 1893 KASIPATHIA v. VENKATA-CHARY.

We are of opinion that the Munsiff was wrong in referring the defendant to a separate suit. The defendant's contention is that, in execution of the decree, the plaintiff has obtained more lands than he was entitled to under it, and in some cases lands to which the defendant was entitled to a share were wholly given over to the plaintiff. All questions relating to execution, discharge, or satisfaction of the decree must under s. 244 of the Code of Civil Procedure be determined by order of the court executing the decree and not by a separate suit. The defendant's contention, that the division was not properly effected in accordance with the decree and that the plaintiff obtained more lands than he was entitled to and shares in some lands not covered by the decree, is supported by the details of the division specified in the lists now submitted by the Amildar to the Deputy Commissioner, and indicated in the plan prepared and annexed thereto. As there was apparently no proper division, we set aside the Munsiff's order, with directions to examine the parties and effect a fresh decision in accordance with the decree. Costs of this appeal will abide the fresh order of the Munsiff. 1893 *November* 22.

Appeal allowed. Case remanded.

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CRIMINAL.

APPEALS.

Before T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1893 *April* 28.

GOVERNMENT *v.* NARANAPA (ACCUSED No. 2).*

AND

GOVERNMENT *v.* LAKSHMANA AND NARSI (ACCUSED Nos. 1 AND 3).*

Guardianship—Illegitimate child—Indian Penal Code (Act XLV of 1860), s. 363—Evidence Act (I of 1872), ss. 25, 26, 27 and 118—Oaths Act (X of 1873), s. 5.

The complainant had in the lifetime of the mother of an illegitimate female child constituted himself the girl's guardian, fed, clothed and brought her up after the death of her mother and regarded her as a member of his own family till she was kidnapped from his custody. *Held* that he was her lawful guardian within the meaning of s. 363 of the Indian Penal Code (Act XLV of 1860) and competent to prefer a complaint of kidnapping from his guardianship under that section.

Also, that the provisions of the Evidence Act (I of 1872) s. 27 cannot be extended so as to allow a Police Officer to depose generally to confessions said to have been made to him by the accused. Such confessions fall under ss. 25 and 26 and cannot be used as evidence against the accused.

Also, (*per* RAMACHENDRA IYER, J.)—If the Magistrate was satisfied that the witness, by reason of tender years, was unable to understand the questions put to her or to give rational answers to them, she was not a competent witness and the Magistrate ought not to have examined her at all. Evidence Act (I of 1872), s. 118. If she was a competent witness, she ought to have been examined upon oath or affirmation. Oaths Act (X of 1873), s. 5.

The *Assistant Government Advocate* (Mr. *S. Ramaswami Iyer*) for the Government.

Mr. *B. Srinivasiengar* for the accused.

*Criminal Appeals Nos. 43 and 48 of 1893 against the finding and sentence in Criminal Case No. 537 of 1892-93 of Mr. Veidyanatha Iyer, City Magistrate of Bangalore, dated the 28th day of February 1893.

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The Judgments of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) were as follows:—

THUMBOO CHETTY, C. J.—The appellants were convicted and sentenced, under s. 363 of the Indian Penal Code, each to undergo rigorous imprisonment for two years, for having kidnapped a girl Kamaru, aged about eight years, who was under the guardianship of the prosecution first witness, Mahomed Esuff.

The grounds of appeal are :—

1. That Mahomed Esuff was not the lawful guardian of Kamaru, and

2. That there was absolutely no evidence against the appellants to support the conviction.

The first objection is, in my opinion, untenable.

Kamaru's mother was a Vakaligar by caste. During the late famine, she renounced her caste and lived with Mussulmans. She also resided for some time in the house of Mahomed Esuff. She died about eight years ago, leaving her illegitimate daughter, the said Kamaru, then an infant, who was taken charge of by Mahomed Esuff. It may be presumed, from the fact that Kamaru's mother at times put up in the house of Mahomed Esuff, that, at her death, she committed the helpless infant to the care of Esuff. Although Esuff was not appointed guardian of the person of Kamaru, under the Rules of 25th April 1872, yet, under the circumstances stated above, he constituted himself as her guardian. As a matter of fact she was fed, clothed and brought up by him for the past seven or eight years and regarded as a member of his own family. This case is ana-

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logous to that of the of *The Empress* v. *Pemantle*(1) and I cannot do better than quote a passage(2) from the judgment of Garth, C. J., which applies exactly to the present case—

"We cannot doubt for a moment that the mother of an illegitimate child is its proper and natural guardian during the period of nurture, and if, during that period, the mother dies, and commits the child, as she did in this instance, to the care of a faithful friend who accepts the trust, and maintains the child in her own house and at her own expense, we think it clear that such a person is 'lawfully entrusted' with the care and custody of the minor, within the meaning of the explanation in s. 361 (Indian Penal Code)."

What constitutes legal guardianship must be judged by the Court from the circumstances of each particular case. This question was elaborately discussed and all the leading cases bearing on the subject were considered in the case of *In the matter of Saithri*(3). As I have before stated, Kamaru was an illegitimate orphan child of tender years when her mother died. None of her mother's relations came forward to take care of the child. Mahomed Esuff, apparently at the request of the mother, took the child under his protection and brought her up in his own house and at his own expense for the past 7 or 8 years, and, under these circumstances, it is clearly for the present and future welfare of Kamaru to regard Mahomed Esuff as her lawful guardian. If we hold that an orphan illegitimate child left destitute cannot be taken care of by another, without the special sanction of the court, so as to give the person taking care of the minor the status of a lawful guardian, it would lead to disastrous consequences, expose the minor to

(1) I. L. R. 8 Cal., 971. (2) At page 974.
(3) I. L. R. 16 Bom., 307.

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dangers and seductions and deprive such a minor of all legal protection. Under the circumstances of this case, I have no hesitation in holding that Kamaru was under the lawful guardianship of Mahomed Esuff at the time she was seduced or taken away from his possession.

Now, as to the evidence offered to support the conviction, it is clearly proved by the admissions of accused No. 1 (Lakshmana) and the evidence of prosecution 4th witness (pleader Muddu Rao) that, on the 3rd February last at about 9 p. m. accused No. 1 took the girl Kamaru with him to the house of the said pleader in Kolar, with a letter *Ex. A*, addressed to one Krishna Iyengar, Deputy Commissioner's Office. The girl was apparently taken to Muddu Rao's house instead of to Krishniengar's, and, from the conversation the pleader had with accused No. 1 and Kamaru, his suspicions were aroused and he gave information forthwith to the Police, who afterwards ascertained that Kamaru was seduced and brought to Kolar from Bangalore. So far as accused No. 1 is concerned, there is not the slightest doubt that he brought the girl from Bangalore to Kolar with a letter which was intended to be delivered to one Krishniengar of the Deputy Commissioner's Office. By whom this letter was written has not been proved. Accused No. 1, in his examination, stated that it was accused No. 3 Narsi who sent the girl with him (accused No. 1) to Kolar. On this point also there is no legally admissible evidence. Kamaru's deposition, which implicates *all* the three accused, was not taken on oath or affirmation and cannot, therefore, be used against the accused.

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The Magistrate was wrong in recording the confessions said to have been made by the accused to the Police Jemadar Soobbaji Rao. He has misunderstood and misapplied the provisions of s. 27 of the Evidence Act. The proviso contained in that section is to the effect that, "when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

It would be most dangerous to extend the provisions of s. 27, so as to allow a police officer to depose generally to confessions said to have been made to him by the accused. In this case, what the Magistrate has recorded, while examining the Police Jemadar, is what is alleged to have been stated by each accused, after arrest, confessing the crime. I shall here quote some portions of the statements of the police officer recorded by the Magistrate—

"Constable Peru Sing brought this girl and accused No. 1 to the station when I was there. I asked accused No. 1 who he was? He replied, 'I am of Bangalore Pettah. I was coming to my relatives' house. One Narayanapa, a Brahmin, gave me charge of this girl and told me to leave her in Krishna Row's house at Kolar, saying he will keep this girl there if you show this letter. He showed me the letter. It is *Ex. A*.' " * *

"I sent for Narnapa, accused No. 2. I asked him. He said 'Narasama brought this girl and left her in

my house.' * * He also said that he wrote *Ex. A* and sent it by accused No. 1 to Bowringpett." * *

"Narasama is accused No. 3. She told me—'These 2 or 3 months Lakshmana (accused No. 1) has been asking me to get him a girl from somewhere. I got this girl at Akkipetta. I brought her and left her in Narnapa's house.'" * * *

Such general confessions, alleged to have been made to a police officer, fall under the provisions of ss. 25 and 26 of the Evidence Act and cannot be used as evidence against the accused. Section 27 is inapplicable to such confessions. Under that section, only "so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." The admission that the accused were concerned in seducing the girl and sending her to Kolar cannot be regarded as information given which led to the discovery of any facts material to the case. The apprehension of persons suspected of having committed an offence, upon information given by an accomplice or co-accused, does not come within the purview of s. 27, so as to entitle a police officer to depose to the information given to him and upon which he arrested certain accused persons. Setting aside all that the Police Jemadar deposed to, as admissions made to him by the accused and which are inadmissible in evidence, there is nothing to connect accused Nos. 2 and 3 with the commission of the offence. It is true that, before the magistrate, accused No. 1 stated that accused No. 3 gave the letter *A* to him and also sent the girl Kamaru with him to Kolar. But there is no evidence to corrobo-

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rate that statement. There can be no doubt that accused No. 1, in taking the girl to Kolar, acted at the instigation of others; but, in the absence of legal evidence to connect accused Nos. 2 and 3 with the commission or abetment of the offence, they cannot be convicted.

I would confirm the conviction and sentence only in the case of accused No. 1, Lakshmana, and set aside the conviction and sentences passed on accused Nos. 2 and 3 Narnapa and Narsi and direct their immediate release.

RAMACHENDRA IYER, J.—I also think that the prisoner Narnapa ought to be acquitted as there was no evidence against him, except the uncorroborated testimony of a girl, who, in the opinion of the magistrate, was too young to be examined upon oath. If the magistrate was satisfied that the girl, by reason of tender years, was unable to understand the questions put to her or to give rational answers to them, she was not a competent witness, and the magistrate ought not to have examined her at all (s. 118, Evidence Act). If she was a competent witness, she ought to have been examined upon oath or affirmation (s. 5, Oaths Act, X of 1873). The questions which were put to her and the answers given by her satisfy me that she was not an incompetent witness and that the magistrate might have examined her after affirmation. We may rectify the mistake and get her evidence recorded in the usual course. But I do not think it necessary, for her statements are so conflicting that I consider it unsafe to rest a conviction upon her evidence alone.

I would also quash the conviction of the third prisoner, Narsi, for the same reasons.

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Against the first prisoner, Lakshmana, there is ample evidence. It was he who actually took the girl with him to Kolar and he was arrested in that town, as he did not satisfactorily account for the girl being in his custody.

The only point which deserves consideration is, whether the girl was taken away out of the lawful guardianship of the complainant, Hakim Mahomed Esuff. He does not explicitly say when and under what circumstances the girl became his ward. As this point has not been cleared up, we agree that the Magistrate should be directed to examine the witness in the presence of the first prisoner and to re-submit the record to us.

After the return of the case by the Magistrate, the following final order was passed by the Chief Court:—

1893 *June 7.*

The fresh evidence which was recorded by the magistrate satisfies us that the complainant constituted himself the girl's guardian, even during the lifetime of the girl's mother, and that he continued to be guardian till the girl was kidnapped. Although the mother did not, when she was about to die, actually entrust the girl to his guardianship, yet, when we consider what was done during her lifetime and since her death, we see no reason to think that he was not the guardian. We therefore uphold the conviction of the prisoner No. 1 and dismiss his appeal.

Conviction of No. 1 affirmed. Conviction of Nos. 2 and 3 quashed.

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Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893. November 6.

KEMPA (ACCUSED) *v.* GOVERNMENT.*

Code of Criminal Procedure (Act X of 1882), ss. 226, 227 and 536—Sessions Trial—Additional charge framed after examination of prosecution witnesses—Prejudice to accused—Grievous hurt—Indian Penal Code (Act XLV of 1860), s. 320 (8)—Mis-direction—Charge triable by assessors tried by jury.

Where, after examination of the prosecution witnesses, the Sessions judge added to charges of offences punishable under ss. 392 and 394 of the Indian Penal Code, a charge under s. 325, *held* that, as the additional charge was equivalent to the second one with omission of the aggravation relating to robbery, the accused had sufficient notice of all the circumstances constituting the offence. He was also given the opportunity of re-calling and examining the witnesses already examined, but did not choose to do so. He was therefore in no way prejudiced by the procedure adopted by the Sessions court.

In his charge to the jury the Sessions judge told them that, because the medical officer gave as his opinion that the wounds caused to the complainant would have required three weeks to heal, the hurt was grievous hurt. *Held* that this was mis-direction and there being no proof that the complainant had actually suffered bodily pain for twenty days, the accused could be convicted of only simple hurt. Although this offence was one triable by assessors and not by a jury, s. 536 of the Criminal Procedure Code provided that the trial should not on that ground only be invalid. The conviction was therefore altered to one for simple hurt and the sentence reduced to one year's imprisonment.

The *Assistant Government Advocate* (Mr. *S. Ramaswami Iyer*) for the Government.

Mr. *Subba Rao* for the accused.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

This was a case tried by the Sessions Judge of Nandidroog Division with the aid of a jury.

* Criminal Appeal No. 60 of 1893-94 against the conviction and sentence in Bangalore Sessions Case No. 6 of 1893-94 by Mr. T. Narahari Rao, Sessions Judge of Nandidroog Division, dated the 16th day of September 1893.

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The accused was charged with robbery, punishable under s. 392 of the Indian Penal Code, and with having voluntarily caused grievous hurt to one Devaka with intent to commit robbery, under s. 394 of the Indian Penal Code.

After some of the witnesses for the prosecution had been examined, the Sessions Judge framed an additional charge of voluntarily causing grievous hurt, under s. 325 of the Indian Penal Code.

The judge, agreeing with the jury, acquitted the accused of the charges framed under ss. 392 and 394 of the Indian Penal Code and convicted him only of the offence under s. 325, of having voluntarily caused grievous hurt to Devaka and sentenced him to undergo rigorous imprisonment for five years.

The present appeal is based on two grounds :—

I.—That there was a mis-direction to the jury as to the law of the case and that the accused was thereby prejudiced, as also by the additional charge being framed under s. 325 of the Indian Penal Code after the prosecution was closed.

II.—That the sentence was excessive under all the circumstances of the case.

The advocate for the accused has failed to satisfy us that the accused was in any way prejudiced or taken by surprise by the additional charge having been framed under s. 325 of the Indian Penal Code.

In the second charge framed by the committing magistrate, it was clearly stated that the accused voluntarily caused grievous hurt to Devaka in attempting to commit robbery. The additional charge framed by the Sessions Judge was the same as the second charge with the omission or subtraction of so

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much as related to the commission of robbery. The original charge, therefore, gave the accused notice of all the circumstances which constituted the offence of hurt. Then again, it must be observed that, after the additional charge was framed, the accused had every opportunity of re-calling and examining the prosecution witnesses already examined, and he did not choose to do so, but contented himself with examining his own witnesses.

Sections 226 and 227 of the Criminal Procedure Code empower the sessions court to add to or alter a charge. The accused has in no way been prejudiced by the procedure adopted by the Sessions Judge.

As regards the mis-direction, we observe that the Sessions Judge was wrong in stating in his charge to the jury that, because the medical officer gave as his opinion that the wounds caused to Devaka would have required three weeks to heal, the hurt was grievous hurt. Under s. 320 (8) of the Indian Penal Code, grievous hurt is defined to be "any hurt which endangers life, or which causes the sufferer to be during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits."

Devaka, the complainant, stated that she was under treatment in hospital for only two days. The Hospital Assistant deposed that the wound on her head would have required *about* three weeks to heal and the rest of the injuries could have been healed in eight days; but there is no proof that Devaka had actually suffered bodily pain for the full period of twenty days, or that she was unable to follow

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her ordinary pursuits during that period. The Hospital Assistant also admitted that she was under treatment in the Hospital for only two days, and he does not say that the wounds caused were such as endangered her life. Under these circumstances, the Sessions Judge was wrong in his exposition of the law to the jury. He should have told the jury that the facts proved, if believed, constituted only simple hurt punishable under s. 323, and not grievous hurt punishable under s. 325 of the Indian Penal Code. The offence under s. 325 of the Indian Penal Code was triable with the aid of assessors and not by a jury; but, under s. 536 of the Criminal Procedure Code, the trial shall not on that ground only be invalid.

The judge and jury have believed the evidence as to hurt having been caused to Devaka. We see no reason to dissent from them and we direct, under s. 237 of the Criminal Procedure Code, that the conviction of the accused be altered to an offence falling under s. 323 of the Indian Penal Code; and, as the maximum punishment provided for the offence is only a year, we reduce the sentence of imprisonment passed by the Sessions Judge from 5 years to 12 months. This disposes of the second ground of appeal.

Conviction altered and sentence reduced.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

1893 November 10.

NANJUNDA (ACCUSED) v. GOVERNMENT.*

Indian Penal Code (Act XLV of 1860) ss. 302 and 326—Murder—Grievous hurt.

The accused was sentenced to death for murder and also, in the

* Criminal Appeal No. 57 of 1893-94 against the conviction and sentence in Bangalore Sessions Case No. 4 of 1893-94 by Mr. T. Narahari Rao, Sessions Judge of Nandidroog Division, dated the 23rd day of September 1893.

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event of the sentence not being confirmed, to eight years rigorous imprisonment for causing grievous hurt to certain persons when a hue and cry was raised after him. *Held* that there was no connection between the murder and the grievous hurt and it could not be inferred from the accused committing the latter that he was guilty of the former, as to which there was no evidence on which he could be convicted. The conviction and sentence for murder were set aside, but those for grievous hurt were upheld as it had been proved that one of the persons injured was treated in hospital for more than twenty days, though there was no evidence as to the other persons to take their case beyond simple hurt punishable under s. 324 of the Indian Penal Code.

The *Assistant Government Advocate* (Mr. *S. Ramaswami Iyer*) for the Government.

Mr. *Narayana Rao* for the accused.

The judgment of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows :—

The appellant was convicted of having murdered one Gunda and was sentenced to death under s. 302 of the Indian Penal Code. He was also convicted of having caused grievous hurt to Thamana and three others and sentenced under s. 326 of the Indian Penal Code to undergo rigorous imprisonment for eight years, should the sentence of death be not confirmed.

In his appeal to this court, the accused objects only to the conviction and sentence under s. 302 of the Indian Penal Code. Even his advocate did not seriously dispute the propriety of the conviction and sentence under s. 326 of the Indian Penal Code.

With regard to the charge of murder, the assessors were of opinion that there was no proof that the appellant murdered Gunda, while the Sessions Judge, differing from them, held that the guilt of the accused was established for reasons summarized in para. 36 of his judgment, namely, (1) that the de-

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ceased was last seen with the accused quarrelling, (2) that a few hours afterwards the corpse of the deceased was found concealed in a water-course not far from the scene of quarrel, (3) that the accused ran amuck and wounded those who went to see the corpse and (4) that there was ill-will between the accused and the deceased.

There is no direct evidence of the murder. The Sessions Judge infers the guilt of the accused from the evidence of a witness who speaks to having seen the accused and the deceased quarrel with each other a few hours before the corpse of the deceased was found in a water-course not far from the scene of quarrel. No doubt the fact, that the deceased was last seen alive in the company of the accused, is a very suspicious circumstance against the accused, but it is not safe to base a conviction for murder on such circumstance alone, more especially in this case as the evidence on the point is the uncorroborated statement of a young lad of seven years of age. Moreover, the boy's evidence does not clearly show what was the cause or the nature of the quarrel. He simply states that Gunda (deceased) questioned the accused as to why he was cutting firewood. Whether upon this there was any serious altercation or fight, the boy's evidence does not disclose. Then again it is said that, immediately after information of the quarrel had reached the witness, Bikal Muneapa, he went to the place where the quarrel is said to have taken place and found the accused alone there, but not the deceased. It is impossible to believe that, within the very short interval of half an hour or so, the murder could have been committed and the body

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carried by the accused alone and concealed in the water-course and that the accused would have forthwith returned to and remained in the very place where the quarrel is said to have occurred. The evidence of another boy, aged eleven years, named Lutchma, to the effect that he saw the accused dragging the body of the deceased to the *kuntai* laying hold of a hand and leg, has been wholly discredited by the judge and assessors and for very good reasons. A mere perusal of the boy's deposition shows that the whole narrative is a pure concoction. Bikal Muneapa found no stains of blood or other traces which might have aroused his suspicion against the accused. He says he returned to his house to take his food satisfied with the reply the accused gave, that Gunda (the deceased) went into the jungle. It was late in the afternoon when the corpse was discovered. After a hue and cry were raised against the accused he struck the widow of the deceased, and three other of the witnesses with a chopper he had in his hand. So far as the striking and wounding of these witnesses is concerned, it is an occurrence that took place some time after the dead body of Gunda was discovered, but it cannot be connected with the actual murder of Gunda. As already remarked, there is not a particle of evidence to prove when, or by whom Gunda was actually murdered. Exasperated probably at the charge of murder, the accused, in a fit of anger, committed the assault and caused hurt to the several persons aforementioned; but, from this circumstance itself, it cannot be inferred that he murdered Gunda. No doubt very great suspicion attaches to the accused, but mere suspicion is not

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proof. It is said that the accused admitted he murdered Gunda. This admission, which is not corroborated by any independent or reliable evidence, is of so questionable a shape that no credit ought to be given to it. Such evidence is easily adducible, and, where a man's life is at stake, it cannot be accepted without hesitation. It is also said that there was ill-will between the accused and the deceased. The evidence on this point is conflicting. One witness stated that the accused and deceased were on good terms prior to the death of the latter. Another said that he heard from the accused and the deceased there was a misunderstanding between them in regard to some casuarina plantation. This witness had no personal knowledge of the cause of the dispute; he simply heard what each said in the absence of the other. Such evidence is not worthy of credit.

The discovery of a knife and a blood-stained cloth in the accused's house does not help us in disposing of the charge of murder, as it has been proved, in connection with the charge of causing grievous hurt under s. 326 of the Indian Penal Code, that the accused used a knife in striking and wounding the witnesses attacked by him and his cloth may have been then stained with blood. The *kodli* said to have been found in the pond near the scene of the alleged murder was not identified nor was it shewn to the medical officer.

There is absolutely no evidence conclusively to establish that it was the accused that murdered Gunda. The accused must, therefore, be acquitted of murder. The conviction and sentence under s. 302 of the Indian Penal Code will be set aside.

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With regard to the charge of grievous hurt, the medical evidence shows that the wounds caused to one man Thamana, with a *mochu* knife on the head were of a serious nature. He was treated in hospital for more than twenty days and his case falls clearly under s. 326 of the Indian Penal Code. With regard to the hurt caused to the others it is not quite clear from the medical evidence that they were in severe bodily pain or unable to follow their ordinary pursuits for twenty days. Their case is one of simple hurt falling under s. 324 of the Indian Penal Code. However, as the accused has rendered himself liable, for the offence committed on Thamana, to be punished under s. 326 with imprisonment for a term which may extend to 10 years and as the 8 years' imprisonment awarded to him is, under all the circumstances, not excessive, the conviction and sentence under s. 326 of the Indian Penal Code need not be disturbed. It is unnecessary to pass any separate sentence for the offence under s. 324 of the Indian Penal Code.

Conviction for murder set aside. That for grievous hurt confirmed.

CRIMINAL REVISION.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893 June 23.

THE GOVERNMENT v. KONGALA MOONI (ACCUSED).*

Indian Penal Code (Act XLV of 1860) s. 411—Dishonestly retaining stolen property—Evidence.

Where the accused had been convicted under s. 411 of the Indian Penal Code, because she had picked up some pieces of gold

* Criminal Revision No. 106 of 1893 of conviction and sentence in Criminal Case No. 374 of 1892-93 by Mr. G. Hume Wright, Special First-class Magistrate of Kolar Gold Fields, dated the 5th day of June 1893.

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quartz near an abandoned shaft, but the only evidence for the prosecution was as to possession by her, *Held* that in the absence of evidence to prove that the quartz had been stolen or that the accused had any reason to believe that it had been stolen, the conviction was wrong and must be quashed.

The Judgments of the Chief Court (RAMACHENDRA IYER, and KRISHNA MURTI, JJ.) were as follows:—

KRISHNA MURTI, J.—The conviction cannot be sustained, as there is no legal evidence to support it. The accused has been acquitted of any offence regarding the gold. It is only with regard to the nine pieces of quartz containing visible gold that the magistrate finds her guilty. Her plea is, that she found them near an abandoned shaft. The magistrate does not find that this statement is false. On the other hand, he grants that it might have been so, but argues that, even in such a case, the prisoner should not have 'annexed' it, whatever that word may mean. This view of the law is incorrect. There is no dishonest intention; and no such liability, as is assumed by the magistrate, has been imposed upon the accused by any rule or principle of law. She picked up a few pieces lying about an abandoned shaft not owned or claimed by any one. The act does not even amount to criminal misappropriation and much less to the dishonest retaining of stolen property; none of the ingredients of which offence have been alleged or proved. The conviction is set aside and the prisoner directed to be set at liberty forthwith.

The Inspector-General of Prisons will be requested to take note of the conduct of the Lock-up officer, who released the prisoner when the order of this court directed only the suspension of the sentence.

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RAMACHENDRA IYER, J.—I also think that the conviction under s. 411 of the Indian Penal Code ought to be quashed, as there was no evidence to prove that the quartz had been stolen, and that the accused had any reason to believe that it had been stolen. The only witness who was examined for the prosecution deposed that the quartz was in the possession of the accused. The latter stated that she picked it up near a shandy. It is not right to conclude from this evidence alone that the accused knew that the property had been stolen and that she retained possession with that guilty knowledge.

Conviction quashed.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

1893 Dec. 20.

THE GOVERNMENT v. VENKATARANGIA (ACCUSED).*

Railway Act (IX of 1890)—Railway Act (IV of 1879)—Trespass on line—Fencing.

The owner of a cow that had trespassed on the railway near Kumbalgode in the Mysore State was convicted and sentenced under s. 125 of the Indian Railway Act (IX of 1890). *Held* that Act IX of 1890 was not in force in Mysore, but Act IV of 1879. As the latter Act imposes the condition precedent that the fencing on both sides of the railway line should be in a proper condition before a person can be punished for trespass, the conviction was bad; but the magistrate was directed to ascertain the question of fact necessary and proceed in due course of law.

The Order of the Chief Court (RAMACHENDRA IYER and KRISHNA MURTI, JJ.) was as follows :—

It is a matter of great regret that, before deciding the case, the magistrate did not take the trouble to ascertain the law in force on the subject. The

* Criminal Revision No. 65 of 1893-94 of conviction and sentence in Criminal Case No. 188 of 1893-94 by Mr. Mir Shujayet Ali, District Magistrate of Bangalore, dated the 12th day of September 1893.

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Railway Act (IX of 1890) of British India which is referred to by him is not in force here. Under Act IV of 1879 which is in force in Mysore, it is a condition precedent that the fencing on both sides of the railway line should be in a proper condition. That this fact should be ascertained by the magistrate has been pointed out by this court in a similar case. In the absence of a finding on this point, we are not prepared to uphold this conviction, which is accordingly set aside, and the fine, if levied, will be refunded. In the interests of the Railway Administration, we deem it necessary to add that this order shall not be a bar to the accused person being proceeded against in due course of law.

Conviction set aside.

1893
June 2.

Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

CHUDANA AND ANOTHER (ACCUSED) *v.* THE GOVERNMENT.*

Penal Code (Act XLV of 1860) ss. 101, 352 and 358—Assault on provocation—Conviction against findings—Conviction on surmise or inference not warranted by facts.

A complaint was made of assault punishable under s. 352 of the Indian Penal Code. The magistrate found that the complainant first assaulted the accused and he further expressed his disbelief in the story of the prosecution witnesses. He, however, convicted the accused under s. 358 of the Indian Penal Code of assault on grave and sudden provocation, considering that they *might have*, after they were beaten, returned the blows. *Held* that the inference of the Magistrate was not warranted by the evidence nor by the magistrate's first finding and a conviction could not be based upon a mere surmise or inference not warranted by facts.

Further (*per* KRISHNA MURTI, J.)—The accused were clearly justified in exercise of the right of private defence under s. 101 of the Indian Penal Code even if they had assaulted the complainant in return for the blows which he gave them.

*Criminal Revision Petition No. 52 of 1893 against the conviction in Criminal Case No. 509 of 1892-93 of Mr. S. Vidyanatha Iyer, City Magistrate of Bangalore, dated the 22nd day of February 1893.

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CHUDANA v. GOVERNMENT.

Mr. *B. Srinivasiengar* for the petitioners.

The *Assistant Government Advocate* (Mr. *S. Ramaswami Iyer*) for the Government.

The Orders of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) were as follows :—

THUMBOO CHETTY, C. J.—The petitioners were convicted by the Bangalore City Magistrate under s. 358 of the Indian Penal Code, of having, on grave and sudden provocation, assaulted the complainant and were sentenced to pay each a fine of Rs. 5 or, in default, to undergo a week's simple imprisonment. They have applied to this court for revision of the magistrate's proceedings.

The complainant charged the accused with assault under s. 352 of the Indian Penal Code. He and his witnesses deposed that, on the night of the 12th December last, while the complainant was returning to his house and was about to go in, he was assaulted and beaten by the petitioners and other persons who were acquitted by the magistrate.

The magistrate disbelieved the case as put forward by the prosecution. To quote his own words, he says :—" Considering the whole of the statements of these witnesses put together, I doubt whether these witnesses saw the assault committed upon the 1st witness (complainant) by the accused." If the magistrate discredited the prosecution witnesses and found that the assault, as alleged by the complainant, was not proved, there was no necessity to go into the defence or to discuss the evidence offered by the accused.

The witnesses for the accused stated that it was

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the complainant who attacked and assaulted the accused without any cause. However, after alluding to the defence evidence, the magistrate found that "it was the complainant who gave the first provocation to the accused by assaulting them, who *might have* returned their blows afterwards." This is a very curious finding. If the complainant was the aggressor and the one who gave the provocation and actually assaulted these accused and if what the prosecution witnesses stated, as to the complainant having been beaten by the accused, was unworthy of credit, the inference, that the accused *might have*, after they were beaten, returned the blows, is not warranted by the evidence nor by the first finding of the magistrate. A conviction cannot be based upon a mere surmise or inference not warranted by facts. The judgment of the magistrate convicting the accused, cannot, therefore, be supported.

The conviction and sentence must be set aside and the fines, if recovered, refunded to the petitioners.

KRISHNA MURTI, J.—I agree to this order. The reasoning of the magistrate is certainly faulty as pointed out by the learned Chief Judge, but, even accepting the finding of fact, that the accused persons did return the blows after they were beaten, I hold that that finding does not go far enough to support the conviction under revision. The magistrate does not explain why the right of private defence set up by the accused does not help them. The finding does not distinctly state that the assault on the accused persons had altogether ceased and that they returned the blows when peace had been restored and when every thing was calm. I understood what

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the magistrate meant was that, in a hand-to-hand scuffle, the petitioners, who were beaten, at first returned a few blows. The *Assistant Government Advocate*, who argued the case in support of the conviction, did not contradict this view. On the other hand, he seemed to contend that the right of private defence did not extend to an ordinary assault on one's person. I have no hesitation in saying that this view is erroneous. Section 101 of the Indian Penal Code is very clear and does give such right in cases where the offence is not of any of the descriptions mentioned in the preceding section, but restricts the right "to the voluntary causing to the assailant of any harm other than death." The magistrate's exposition of the case and his defective finding certainly favor the supposition, that the assault was committed by the petitioners when one was aggressively committed on themselves. Under the circumstances, the natural presumption is that they did so to defend themselves and to drive away the aggressive assailants, and such act is clearly covered by s. 101 of the Indian Penal Code. It seems to me ridiculous to contend that one who is beaten in a street should quietly receive the blows and even before driving off his assailant by force run to a police station to complain of the assault. I would quash the conviction and direct the refund of the fine, if it has been levied.

Conviction quashed.

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Before T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

THIMMARAYA (ACCUSED) *v.* THE GOVERNMENT.*

1893 *June 7.*

Penal Code (Act XLV of 1860) ss. 379 and 403—Theft—Criminal misappropriation—Conviction on surmise or inference not warranted by facts—Detention—Possession.

The accused was convicted of theft of two bullocks, and on appeal the District Magistrate altered the conviction to one of criminal misappropriation under s. 403 of the Indian Penal Code, holding that there was no theft proved, but that it appeared to him the accused finding the bullocks straying unattended and not knowing whose they were had detained them dishonestly. *Held,* that the District Magistrate having found the accused had not stolen the bullocks should have acquitted him, as there was no evidence of their having strayed, or of the accused having taken possession of them in the manner surmised by the District Magistrate. The magistrate was not justified in setting up a case quite distinct from that alleged for the prosecution, when the latter failed.

Further (*per* KRISHNA MURTI, J).—Under s. 403 of the Indian Penal Code, there must be a completed appropriation or conversion to the offender's own use. Simple possession is not sufficient. In the present case, the finding of the District Magistrate that the bullocks had been merely detained is not sufficient to constitute the offence of misappropriation.

Mr. *Jayaram Iyer* for the petitioner.

The judgments of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) were as follows:—

THUMBOO CHETTY, C. J.—The petitioner in this case was convicted of theft of two bullocks by the Third-class Magistrate, Mr. Laing Meason, and sentenced to a week's simple and three weeks' rigorous imprisonment, under s. 379 of the Indian Penal Code.

On appeal, the District Magistrate held that there

* Criminal Revision Petition No. 58 of 1893 against appellate order No. 38 of 1892-93 of Mr. Mir Shujayet Ali, District Magistrate of Bangalore, dated the 1st day of May 1893 confirming the conviction in Criminal Case No. 66 of 1892-93 of the Third-class Magistrate of Bangalore.

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was no theft; that it appeared to him that the accused did not steal the bullocks, but, finding them astray unattended and not knowing whose they were, detained them dishonestly. The District Magistrate accordingly convicted the accused of criminal misappropriation under s. 403 of the Indian Penal Code, and upheld the sentence.

The petitioner now asks this court to revise the proceedings of both the Magistrate and District Magistrate, on the various grounds set forth in the application for revision.

The District Magistrate, having found that there was no theft, ought to have acquitted the accused. There is no evidence of the bullocks having strayed from the yard of the complainant's house in which they were tied up, or of the accused having taken possession of them in the manner surmised by the District Magistrate. In criminal cases, it will not do to convict an accused person upon mere surmises or inferences not warranted by the evidence. It is not the complainant's case, that both the bullocks strayed away from his house. He alleged that they were stolen. He having failed to prove they were stolen, the District Magistrate was not justified in setting up a case quite distinct from that alleged for the prosecution. The theory of theft having been discredited and held to be false, the plea put forward by the accused, that he had advanced money to the complainant and, as the latter was unable to repay, the bullocks were given to the accused, seems probable and reliable. No good reasons have been given by the courts below for discrediting the several witnesses who were called by the accused and who de-

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posed in the main to facts which established his plea. Even assuming that that plea has not been satisfactorily established, as no theft was proved, there is a doubt, the benefit of which ought to have been given to the accused. In this view, the conviction and sentence complained of must be quashed, and the accused set at liberty.

The District Magistrate remarks that Mr. Laing Meason has not been empowered to record evidence in English. If so, the evidence ought to have been recorded, under s. 356 of the Criminal Procedure Code, in Canarese which is the language of the court over which Mr. Laing Meason presides. The whole of the depositions having been recorded in English, without the authority required by the proviso to s. 357 of the Code of Criminal Procedure, the proceedings of the magistrate were void. However, this objection need not be further considered, nor a fresh trial ordered, as the allegation of theft is highly improbable and unreliable, as found by the District Magistrate.

KRISHNA MURTI, J.—I am also of opinion that in this case the conviction ought to be set aside. Sitting as we do as a court of revision, I do not think it expedient to discuss the evidence or to consider the correctness of the finding of fact based upon such evidence. But I hold that in this case the facts found by the District Magistrate do not go far enough to support the conviction. The finding is given in the following words :—

" What seems the truth to me is, that the accused did not steal the bullocks but, finding them astray unattended and not knowing whose they were, detained

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them dishonestly—dishonestly, because, when he was first questioned, he said he had bought them."

The bullocks were found with the accused on the next day after they were missed and in the same village. There is no evidence at all on the record that the prisoner had in any manner *used* the bullocks. The District Magistrate finds that they had only been *detained.* It seems to me that a detention only is not sufficient to constitute the offence of misappropriation. As the word signifies and as the offence is defined, there must be a completed appropriation or conversion to the offender's own use. Accordingly, we find, in every one of the illustrations appended to s. 403 of the Indian Penal Code, that the property appropriated has been used. The only exception is contained in illustration (*a*) where A finds a rupee on the high road, not knowing to whom the rupee belongs and picks it up. This is said to be no offence, because, as I have argued in Revision Case No. 41 of 1891, the mere act of picking up does not indicate any appropriation to one's own use or conversion. In the case before us, there is no finding as to how long the prisoner detained the bullocks, nor as to when he became first possessed of them. Such a detention cannot amount to appropriation or conversion "for it is not his possession, but his conversion, of the property that is alone of the essence of this offence." Collett's Penal Code, page 145.

The inference of dishonesty from the fact that the prisoner said he had bought the bullocks, "when first questioned," is erroneous. There is no reference to the time when this question was

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asked, whether before or after the prisoner had been deprived of their possession. If, after such event, the prisoner set up a false defence before the magistrate or the police, it does not show that at the time he became possessed of the bullocks or during the time he continued in possession of them, he intended wrongfully to appropriate the property to his own use. The conception of the idea for defending himself has no relation to the fact of possession or detention, and whatever is done after the prisoner has been divested of the possession cannot divulge the intention with which the property was first taken or subsequently detained. In the absence of a clear finding regarding the time when this question was first put, I deemed it proper to read the evidence, but found nothing in it about such a question having been put either when the bullocks were first found with the accused by the complainant, or when the *patel* put them in charge of the *totee.*

For these reasons, I hold that the facts found by the District Magistrate do not necessarily constitute the offence of which he has found the prisoner guilty, and order his release forthwith.

It is unnecessary to discuss the other questions raised for the petitioner in this case.

Conviction quashed.

Before A. Ramachendra Iyer, Offg. Chief Judge and C. Meenacshaya, Offg. Judge.

1893. Sept. 19.

SUBANACHAR (ACCUSED) v. THE GOVERNMENT.*

Penal Code (Act XLV of 1860) ss. 188 and 341—Wrongful Restraint—Breach of District Magistrate's order.

The accused, who was in possession of a *mutt* prevented the

* Criminal Revision Petition No. 126 of 1893 against the conviction in Criminal Case No. 128 of 1892-93 of Mr. Ramanujiengar, First-class Magistrate of Shimoga.

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complainants from entering and performing a ceremony there. They were thereupon convicted of wrongful restraint and sentenced to fine under s. 341 of the Penal Code. The Magistrate laid stress upon an order said to have been passed by the District Magistrate, in defiance of which the accused had resisted or prevented the complainants from performing the ceremony. *Held* that, if the complainants possessed equal rights with the accused and others as regards the *mutt*, the accused might be liable to pay damages for any unlawful interference with such rights, but could not be convicted of any offence. The order of the District Magistrate did not affect the case. If the District Magistrate passed any order which the accused was bound to obey, and if he acted in defiance of the order he might be punished under s. 188 of the Penal Code.

The *Petitioner* in person.

The *Assistant Government Advocate* (Mr. *S. Ramaswami Iyer*) for the Government.

The Order of the Chief Court (RAMACHENDRA IYER, *Offg*. C. J. and MEENACSHAYA, J.) was as follows :—

The accused was in possession of a *mutt*. The complainants made preparations to perform a ceremony in the said *mutt* and they were prevented by the accused from entering the building. It may be that the complainants, the accused and others have equal rights, and that the accused was wrong in endeavouring to deprive the complainants of their right. If his act was unlawful, he would be liable to pay damages. But we do not see how he could be convicted of any offence. The magistrate has laid stress upon an order said to have been passed by the District Magistrate. We do not think that this affects the question at all. If the District Magistrate passed an order which the accused was bound to obey and if, in defiance of the order, he resisted or prevented the complainants from performing the ceremony, he might be punished under

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s. 188 of the Indian Penal Code. We cannot but express our surprise and regret that a gentleman who exercises the powers of a magistrate of the first-class should have convicted the accused under s. 341 of the Indian Penal Code. We quash the conviction and sentence and direct that the fine, if levied, be refunded.

Conviction quashed.

Before A. Ramachendra Iyer and P. N. Krishna Murti, Judges.

In the Matter of TIMACHARI (PETITIONER).*

1893 November 6.

Refusal by Magistrate to permit procession—Powers of revision—Procedure.

The District Magistrate refused a license for a marriage procession on the ground that it was against *mamool*. *Held*, that the Chief Court could not on revision interfere with the order and direct the Magistrate to grant a license. But, when Magistrates exercise such powers, they should state clearly the provisions of the law under which they proceed and the circumstances or facts which move them.

Mr. *H. Lubeck* for the petitioner.

The *Assistant Government Advocate* (Mr. *S. Ramaswami Iyer*) for the Government.

The order of the Chief Court (RAMACHENDRA IYER, and KRISHNA MURTI, JJ.) was as follows:—

The District Magistrate has refused a license for a marriage procession on the ground that it is against *mamool*, which means, we presume, that the procession would be distasteful to the public and might lead to disturbance of the peace. We do not see how we can interfere with the order and direct the magistrate to grant a license. We reject the

* Criminal Revision Petition No. 68 of 1893-94 against the Order of the District Magistrate of Kadur, dated the 13th day of August 1893.

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application, but observe that, when magistrates exercise the power vested in them they ought to state clearly the provisions of the law under which they proceed and the circumstances or facts which move them. In this instance, the District Magistrate's order is defective in both these particulars.

Application rejected.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

1893 *Nov.* 20.

KASIM SAIB AND ANOTHER (ACCUSED) *v.* THE GOVERNMENT.*

Hackney Carriages Regulation, 1886—Municipal Rules—Registration and licensing of carriages.

Carriages kept in places outside the *B* City Municipal limits, which bring passengers in from such places to *B* City, there unload and afterwards return to their own station are not kept for hire and used within the *B* City so as to require to be licensed by the Municipality of the said City under the Hackney Carriages Regulation, 1886, or the Rules thereunder; and a conviction of the owner of such a carriage for not taking out a license from the *B* City Municipality was illegal.

Mr. *D. Vaidiyanada Iyer* for the accused.

The Order of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) was as follows:—

The conviction in both these cases is wrong. The Bangalore City Hackney Carriages Regulation, 1886 (published in the *Mysore Gazette*, 12th March 1887, Part III) and the rules issued thereunder (published in the *Mysore Gazette*, dated 24th December 1887) apply to hackney carriages used for the conveyance of passengers within the Municipal limits of the City of Bangalore; and the owner of every such

* Criminal Revision Petitions Nos. 63 and 64 of 1893-94 against the convictions in Criminal Cases Nos. 106 and 107 of 1893-94 of Mr. S. Vidyanatha Iyer, City Magistrate of Bangalore, dated the 11th day of September 1893.

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carriage is required to take out a license from the Municipality for such carriage. But neither the Act nor the Rules can be applied to carriages kept at places outside the Bangalore City Municipal limits and which bring in passengers, &c., unload them at Bangalore and return to their own stations. In both the cases under reference, it is shewn that the carts brought passengers from Hossur, Chick Ballapur and other places to Bangalore and returned to their own stations, and that the carts were not kept in Bangalore and used for hire within the City Municipal limits. The evidence for the prosecution was not to the effect that the carts referred to were kept for hire and used within Municipal limits. The magistrate's view of the law, that, though these carts were kept at Chick Ballapur or Anekal and licensed there, yet they must be licensed also by the Bangalore Municipality, under the Regulation and Rules aforementioned, is incorrect and cannot be supported.

We set aside the convictions and direct the refund of the fines, if recovered from accused.

Convictions quashed.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and P. N. Krishna Murti, Judge.

RAMANA (ACCUSED) v. THE GOVERNMENT.*

1893 Dec. 1.

Penal Code (Act XLV of 1860), ss. 323, 340, 352, 357—Assault—Wrongful confinement—Code of Criminal Procedure (Act X of 1882) s. 345—Compoundable offence.

Where the accused, in course of an assault committed by him on the complainant, pushed and dragged the latter towards the *pial* of a house, *Held* that such acts of the accused, being done in

* Criminal Revision Petition No. 90 of 1893-94 against the conviction in Criminal Case No. 14 of 1893-94 of the District Magistrate of Kadur.

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the course of committing the assault, could not aggravate the offence into one punishable under s. 357 of the Penal Code as an assault committed in attempting to wrongfully confine the complainant; and that a compromise entered into by the parties was legally admissible, the offence being one of simple assault, compoundable under s. 345 of the Code of Criminal Procedure.

The *Petitioner* in person.

The *Assistant Government Advocate* (Mr. *S. Ramaswami Iyer*) for the Government.

The Order of the Chief Court (THUMBOO CHETTY, C. J. and KRISHNA MURTI, J.) was as follows:—

We are of opinion that this was a simple case of assault which has been magnified into an offence falling under s. 357 of the Indian Penal Code, instead of one falling under s. 352 or 323 of the Indian Penal Code. We have read the evidence of the prosecution witnesses, and there is nothing in it to warrant the framing a charge under s. 357. There was no attempt to wrongfully confine the complainant when he was assaulted by the accused, within the meaning of s. 340 of the Indian Penal Code. It is true the accused pushed the complainant and dragged him towards a *pial* of Malhari Rao's house. That was done in the course of committing the assault. The parties having entered into a compromise, and complainant himself having reported the compromise to the court, and the offence, as already observed, being a simple assault, it was compoundable under s. 345 of the Code of Criminal Procedure. The magistrate was wrong in refusing to admit the compromise and holding further enquiry into case. We quash his proceedings, and direct him to admit the compromise, and to pass an order thereon, according to law.

Proceedings quashed.

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CRIMINAL REFERENCES.

Before T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer, Judge and C. Meenacshaya, Offg. Judge.

1893 *March* 23.

THE GOVERNMENT *v.* VADEROO AND OTHERS.*

Code of Criminal Procedure (Act X of 1882) s. 437—Discharge by Magistrate—Further inquiry—Additional evidence—Revisional jurisdiction—Notice to accused.

It is competent to a District Magistrate under s. 437 of the Code of Criminal Procedure to direct further inquiry to be held where additional evidence is not forthcoming.

It is proper that notice should be given to an accused person before making an order under s. 437 of the Code of Criminal Procedure; though such notice is not expressly required.

THUMBOO CHETTY, C. J.—The grounds for further inquiry may be (1) misappreciation of evidence and incorrect finding (2) mistake of law (3) irregularity in procedure or (4) any other good and sufficient reason arising upon a consideration of the circumstances of each case * * * * . Sec. 437 of the Code of Criminal Procedure cannot be construed in a limited sense but according to the ordinary meaning of the language used which is wide enough to admit of the further inquiry being ordered even in a case in which no additional evidence is forthcoming, but in which the Magistrate who discharged the accused has, in the opinion of the District Magistrate, not rightly appreciated the credit due to the witnesses and has erred in his inferences and findings.

Government v. *Rudra*(1) and *Government* v. *Manjah*(2) reconsidered.

The Order of Reference was as follows:—

RAMACHENDRA IYER, J.—The accused was charged with mischief. The subordinate Magistrate recorded all the evidence adduced by the prosecution, and finding there was no reason to frame a charge, dis-

* Criminal Reference No. 2 of 1893 by Mr. A. Rungasami Iyengar, District Magistrate of Mysore, dated the 31st December 1892 against judgment in Criminal Case No. 5 of 1892 of the First-class Magistrate of Yellandur Jahageer.

(1) 11 M. L. R., 338. (2) 11 M. L. R., 354.

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charged the accused under s. 253 of the Code of Criminal Procedure.

The complainant applied to the District Magistrate for an order for further enquiry under s. 437 of the Code. The District Magistrate was of opinion that the prosecution had made out a *primâ facie* case and that the order of discharge was not right. However he declined to quash the subordinate Magistrate's order as there was no additional evidence to be taken in support of the prosecution. In declining to exercise jurisdiction, he followed the rulings of this court in *Government* v. *Rudra*(1) and *Government* v. *Manjah*(2) which were to the effect that there could be no further enquiry if no additional evidence was to be recorded, and that if a District Magistrate was of opinion that an order of discharge was wrong and there was sufficient evidence to put an accused person upon his trial, he was bound to submit the record for the orders of the Chief Court. These rulings were in accordance with the ruling of the Madras High Court in *Queen-Empress* v. *Amir Khan and another*(3) and also with some of the earlier rulings of the Calcutta High Court. The District Magistrate has submitted the record to us for orders, and he has in a manner requested us to re-consider our previous rulings inasmuch as the decision of the Madras High Court upon which they were based has been overruled by a Full Bench of that Court in *Queen-Empress* v. *Balasinnatambi and others*(4).

All the High Courts are now agreed in the opinion

(1) 11 M. L. R., 338. (2) 11 M. L. R., 354.
(3) I. L. R. 8 Mad., 336. (4) I. L R. 14 Mad., 334.

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that there may be further inquiry when there is no additional evidence to be taken; but the reasons which they have given for this conclusion are different, and they do not seem to be agreed as to the scope of the inquiry which may be ordered under s. 437 of the Code of Criminal Procedure. The Allahabad High Court has held that the power to set aside an order of discharge is not conferred by any section other than s. 437, and that a High Court cannot exercise this power under s. 439. *Queen-Empress* v. *Chotu*(1). But the majority of a Full Bench of the Calcutta High Court did not seem to be inclined to adopt this view. *In the matter of Hari Dass Sanyal* v. *Saritulla*(2). Again, some judges are of opinion that further inquiry includes the framing of a charge and trial, while others hold that "if the Sessions Judge or the District Magistrate is satisfied that on the evidence taken there is a clear case for charging and trying the accused and there is no reason for desiring further magisterial examination, it is ordinarily his duty to refer the case to the High Court which can make a suitable order."(3) The Judges of the Madras High Court have expressed no opinion on this point; but as they have expressed generally their concurrence in the opinion of Justice Wilson of Calcutta, it may probably be assumed that they have agreed in his definition of the scope of "further inquiry." If that be so, then it seems to me there is not much substantial difference between our ruling and the ruling of the majority of the Calcutta Full Bench and the ruling of the Madras High Court.

(1) I. L. R. 9 All., 52. (2) I. L. R. 15 Cal., 608.
(3) I. L. R. 15 Cal., 621.

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If there is additional evidence to be taken we are at issue with all the High Courts in holding that a Sessions Judge or a District Magistrate may order further inquiry. If there is no additional evidence to be taken, if whatever remains to be done is simply to dissent from the finding of a subordinate Magistrate, to set aside the order of discharge and to direct him to frame a charge and to proceed to trial we say that this power ought to be exercised by the Chief Court, and to this extent we have the support of the majority of a Full Bench of the Calcutta Judges and probably of the Madras Judges also. The difference, then, is narrowed to a single point, *viz.*, the procedure to be followed in cases where there is no additional evidence to be taken and where there are no *primâ facie* grounds for framing a charge. It is said that in such a case also, there may be a further inquiry, *i. e.*, re-consideration of the materials already on record. It is this which I am not able to understand. If a magistrate shut out evidence which was forthcoming when he made the inquiry and if the District Magistrate thinks that if the remaining witnesses were examined material relevant facts might be elicited, further inquiry may be directed according to our view. If again a magistrate took a one-sided view and confined the examination of witnesses to one point alone, and if the District Magistrate has reason to think that there were other points which were lost sight of and that if the witnesses were re-called and examined touching those points, more light might be thrown upon the case, here also further inquiry may be directed according to our ruling,

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because it is an inquiry upon further evidence. If a magistrate, after examining one or two witnesses, took a wrong view of the law and discharged an accused person, and the District Magistrate were to dissent from that view and direct the examination of the remaining witnesses, he would be acting in accordance with our ruling. If no such mistakes were committed by a subordinate Magistrate and if no charge is to be made I do not quite see what remains to be done.

In support of our opinion that further inquiry means inquiry upon further materials, we have the authority of the present Chief Justice of Calcutta, the late Chief Justice of Madras and Justices Mitter, Field, Brandt, and Guru Doss Banerjee. The difference of opinion among judges as to the meaning of the phrase "further inquiry" proves that the point is not free from doubt; and when I consider that the judges whose opinion is opposed to ours think that it is desirable to impose restrictions upon the large powers conferred upon District Magistrates, and that it is the duty of a High Court to scrutinize and revise orders passed by subordinate courts under s. 437, it seems to me an additional reason why we should not hastily set aside our ruling. With this expression of opinion upon the question of law raised by the District Magistrate, I would leave it to a Division Bench to dispose of the case before us on the merits.

The following opinions were delivered by the Division Bench on the question referred:—

C. MEENACSHAYA, Offg. J.—Though there is great force in the reasoning of my learned colleague

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RAMACHENDRA IYER, J., I prefer following the Full Bench decision of the Madras High Court in *Queen-Empress* v. *Balasinnatambi*(1). A majority of the Full Bench of the Calcutta High Court have likewise given the same wide interpretation to the expression "further inquiry." In my opinion the expression means not only taking additional evidence, but also a reconsideration of the evidence already recorded, and I consider the Chief Court or the Court of Session or the District Magistrate has power to order either additional investigation of facts, or a fresh consideration or reconsideration of the evidence already recorded.

THUMBOO CHETTY, C. J.—The complaint in this case was that the accused committed mischief and caused loss to the complainant by cutting an embankment between their respective fields whereby there was a great flow of water from the accused's fields to those of the complainant causing damage to the latter.

The complainant and his witnesses deposed to the accused having cut the embankment or bund with their mamootees. The magistrate who tried the case said he was not prepared to place much reliance on the statements of the complainant and his witnesses and that even if the accused be assumed to have cut the bund they could not be made criminally liable, as their object was to save their own crops from submersion and not to cause loss to the complainant.

The District Magistrate thought there was no good reason to distrust the evidence of the com-

(1) I. L. R. 14 Mad., 334.

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plainant and his witnesses and that the prosecution having proved that the accused cut the bund which caused loss to the complainant, the magistrate instead of discharging the accused ought to have put them to the proof of their allegations.

Owing to the ruling of this court in *Government* v. *Rudra*(1) the District Magistrate was doubtful whether he could order further inquiry into the case and therefore submitted the proceedings for the orders of the Chief Court. In the case of *Government* v. *Rudra*(1) it was held by a Division Bench of this Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) that a District Magistrate had no power to quash an order of discharge passed by a magistrate subordinate to him merely on the ground that he (the District Magistrate) differed from the subordinate magistrate in his appreciation of the evidence and to direct a further inquiry under s. 437 of the Code of Criminal Procedure, and that in such a case it was the duty of the District Magistrate to report the case for the orders of the Chief Court under s. 438.

Section 437 of the Code of Criminal Procedure is in these terms:—"On examining any record under s. 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself, or by any of the magistrates subordinate to him, to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged."

The Chief Court, Court of Session and District

(1) 11 M. L. R., 338.

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Magistrate seem to have concurrent jurisdiction under this section to order further inquiry into the case of any accused person who has been discharged.

The section is general in its terms and there is nothing in it restricting the power to direct further inquiry in those cases only in which additional evidence is available or the evidence already taken has not been properly taken. The "further inquiry" contemplated by the section is clearly in furtherance of justice. There is nothing in the section to prevent a District Magistrate directing a further inquiry if he disagrees with the subordinate Magistrate in his appreciation of the evidence and considers upon the evidence already recorded that the order of discharge was improper. Where on findings of fact or on a question of law or in regard to inferences to be drawn from facts proved there is a difference of opinion between the Magistrate who inquired into the case and the District Magistrate, the provisions of s. 437 are wide enough to authorise a District Magistrate to direct further inquiry before the same or another Magistrate. If the District Magistrate considers that further inquiry is unnecessary but that, upon the evidence on record and the facts proved, the order of discharge is wrong he may, if he thinks fit to do so, report the result of the examination of the record made by him to the Chief Court for orders under s. 438. It is not however imperative on him to do so if he makes up his mind to direct further inquiry—in which case further inquiry would include the re-consideration of the evidence already taken and the disposal of the case according to law.

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The grounds for further inquiry may be :—

I. Misappreciation of evidence and incorrect finding;

II. Mistake of law;

III. Irregularity in procedure; or

IV. Any other good and sufficient reason arising upon a consideration of the circumstances of each case.

For the foregoing reasons I am of opinion that s. 437 of the Code of Criminal Procedure cannot be construed in a limited sense but according to the ordinary meaning of the language used, which is wide enough to admit of the further inquiry being ordered even in a case in which no additional evidence is forthcoming, but in which the Magistrate who discharged the accused has, in the opinion of the District Magistrate, not rightly appreciated the credit due to the witnesses and has erred in his inferences and findings. I would return the proceedings to the District Magistrate with the intimation that if he considers further inquiry necessary in the ends of justice he is competent to direct such further inquiry under the provisions of s. 437 of the Code of Criminal Procedure.

It is always desirable to give due notice to the accused to show cause why further inquiry should not be ordered before passing final orders under this section, though such notice is not expressly required to be given.

Ordered accordingly.

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Before A. Ramachendra Iyer, Offg. Chief Judge and C. Meenacshaya, Offg. Judge.

1893
Sept. 19.

THE GOVERNMENT *v.* DASAY GOWDA (ACCUSED).*

Code of Criminal Procedure (Act X of 1882), s. 488—Maintenance—Arrears—Reduction of allowance.

On an application for recovery of arrears of maintenance by a woman in whose favour an order under s. 488 of the Code of Criminal Procedure (Act X of 1882) had been made by a competent court, *Held* that the court had no power to reduce the allowance retrospectively nor, without any application by the husband and a proper trial, to reverse or otherwise interfere with the order prospectively.

The Order of the Chief Court (RAMACHENDRA IYER, *Offg.* C. J. and MEENACSHAYA, *Offg.* J.) was as follows:—

We have no hesitation in saying that the order of the Sub-Divisional Magistrate of Closepet is wrong, and ought to be quashed. He had no power on an application for recovery of arrears by the woman in whose favor an order for maintenance allowance had been passed by a competent court, to reduce the allowance retrospectively: neither had he the power, without any application by the husband and a proper trial, to reverse or otherwise interfere with the order prospectively.

The order of the Sub-Divisional Magistrate is hereby cancelled and he is directed to proceed with the application of the woman for the recovery of arrears, in accordance with the provisions of the Code of Criminal Procedure.

Order set aside.

* Criminal Reference No. 134 of 1893-94 by Mr. Shujayet Ali, District Magistrate of Bangalore, dated the 2nd day of July 1893, against judgment in Criminal Case No. 159 of 1892 of the First-class Magistrate of Closepet Sub-Division, dated the 23rd day of July 1893.

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Before A. Ramachendra Iyer, Offg. Chief Judge and C. Meenacshaya, Offg. Judge.

1893 *Sept.* 19.

THE GOVERNMENT *v.* FAKEERA AND OTHERS.*

Approver—Committal to Sessions—Withdrawal of pardon—Procedure.

Where a committing Magistrate found that an approver, to whom pardon had been tendered by the District Magistrate, was unwilling to give evidence at the inquiry, *Held,* that it was the duty of the committing Magistrate to have sent him back to the District Magistrate in order that the case against him might be inquired into or tried. As however the approver had been, through oversight or negligence, sent to the Sessions Court as a witness, the Sessions Judge ought to have formally withdrawn the pardon and left him to be dealt with according to law.

Further, the pardon tendered by the District Magistrate was forfeited by the refusal of the informer to give evidence, and the charge against him which led to his arrest should be proceeded with and enquired into.

The Order of the Chief Court (RAMACHENDRA IYER, *Offg.* C.J. and MEENACSHAYA, *Offg.* J.) was as follows:—

The reference which has been made to this court would have been avoided if the committing Magistrate had properly done his duty. When he found that the approver was unwilling to give evidence in regard to the matter of the dacoity, he ought to have sent him back to the District Magistrate in order that the case against him might be inquired into or tried. This was most probably what he intended to do. But through oversight or negligence the approver was sent to the Sessions Court to be examined as a witness.

Whether or not he was examined as an approver, there is no doubt that he was examined as a witness on oath before the Sessions Court, and that when he

*Criminal Reference No. 135 of 1893 by the Sessions Judge of Nagar, dated the 31st day of July 1893 against judgment in Criminal Case No. 11 of 1893 of Mr. C. Sreenivasa Iyengar, District Magistrate of Chitaldroog, dated the 22nd day of July 1893.

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GOVERNMENT v. FAKEERA.

was examined, the tender of pardon had not been withdrawn. That being so, it seems to us that the Sessions Judge ought to have formally withdrawn the pardon and left the approver to be dealt with according to law.

We are of opinion that the pardon tendered by the District Magistrate has been forfeited. If there is any reason to proceed against the approver on the charge which led to his arrest, the District Magistrate will proceed with the inquiry and if there is no ground for proceeding he will be released.

Ordered accordingly.

1893 *Sept.* 29.

Before A. Ramachendra Iyer, Offg. Chief Judge and C. Meenacshaya, Offg. Judge.

THE GOVERNMENT *v.* BENGALURAPA.*

Forest Rules, ss. 11 and 40—Felling trees—License.

No person is permitted to fell bamboos in a State forest without a license; and if a person fells more trees than his license permits him to do, his act is unauthorised and he is liable to punishment under *ss.* 11 and 40 of the Forest Rules.

The Order of the Chief Court (RAMACHENDRA IYER, *Offg.* C. J. and MEENACSHAYA, *Offg.* J.) was as follows :—

The order of discharge which was passed by the subordinate Magistrate was, *primâ facie,* wrong. No person is permitted to fell bamboos in a State forest without a license. If a person fells more trees than the license obtained by him permits him to do, his act is unauthorized and he is liable to punishment under ss. 11 and 40 of the Forest Rules.

* Criminal Reference No. 43 of 1893-94 by Mr. Mir Shujayet Ali, District Magistrate of Bangalore, dated the 1st day of September 1893 against judgment in Criminal Case No. 669 of 1892-93 of the Second-class Magistrate of Bangalore, dated the 8th day of March 1893.

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In this case, license *A*, filed by the accused, had no force after 23rd January 1893, and license *B* was for the felling and removal of 1,000 bamboos only. License *C* did not refer to the forest in question. The accused who was proved to have removed 1,500 bamboos, apparently did what he had no authority to do, and the subordinate Magistrate ought to have framed a charge against him under s. 40 of the Rules.

If there had not been so much delay in the District Magistrate's office, and the case had been reported to us shortly after its disposal by the subordinate Magistreat, we might be inclined to issue notice to the accused to show cause why he should not be tried. But we think that further action is not called for, inasmuch as more than six months have elapsed from the date of the order.

As the subordinate Magistrate has recorded that the conduct of the Forest Officer was suspicious, a copy of the judgment and a copy of the Forest Officer's deposition, will be forwarded to the Inspector-General of Forests, together with a copy of these proceedings.

No order.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

THE GOVERNMENT *v.* MARI CHIKKA.*

1893 November 6.

Adjournment—Absence of complainant—Dismissal of complaint—Primâ facie case—Compensation.

Where a complainant and his witnesses having been examined

* Criminal Reference No. 73 of 1893-94 by Mr. Mir Shujayet Ali, District Magistrate of Bangalore, dated the 21st day of October 1893 against judgment in Criminal Case No. 292 of 1893-94 of the Third-class Magistrate of Kankanhalli, dated the 28th day of September 1893.

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the trial was adjourned for the defence witnesses and the complainant did not appear on the adjourned date, *Held* that the absence of the complainant on the adjourned date was no reason for dismissing the complaint; and as the magistrate, by calling on the accused for a defence, showed that he was satisfied a *primâ facie* case had been made out, he had no reason for ordering compensation to be paid to the accused.

The Order of the Chief Court (THUMBOO CHETTY C. J. and RAMACHENDRA IYER, J.) was as follows:—

The complainant and his witnesses were examined and the trial was adjourned for examination of the accused's witnesses. On the adjourned date of trial, the complainant did not appear, whereupon the magistrate acquitted the accused and ordered the complainant to pay compensation to the accused. The order is illegal for two reasons. *Firstly*, the complainant and his witnesses having given evidence, his absence on the adjourned date was no reason for dismissing the complaint. The magistrate ought to have examined the defence witnesses. *Secondly*, the magistrate having called upon the defendant to examine his witnesses, must have been satisfied that a *primâ facie* case had been made out. He had absolutely no evidence to support his finding that the complaint was false and frivolous. The order awarding compensation was wrong and is set aside. The money, if levied, will be refunded to the complainant.

Order set aside.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge and A. Ramachendra Iyer, Judge.

THE GOVERNMENT *v.* CHICKA KEMPA.*

1893 *November* 6.

Adjournment—Absence of complainant—Dismissal of complaint—Compensation—Inference.

In a case of assault both complainant and accused were absent

* Criminal Reference No. 72 of 1893-94 by Mr. Mir Shujayet Ali, District Magistrate of Bangalore, dated the 13th day of October 1893 against judgment in Criminal Case No. 24 of 1893-94 of the Third-class Magistrate of Kankanhulli, dated the 28th day of September 1893.

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on the day fixed for trial. The Magistrate acquitted the accused and ordered the complainant to pay them compensation. *Held,* that the order was wrong as there was no evidence to prove that the complaint was false and frivolous. The absence of the complainant did not warrant such an inference. The absence of all parties would rather indicate a compromise.

The Order of the Chief Court (THUMBOO CHETTY, C. J. and RAMACHENDRA IYER, J.) was as follows:—

This was a case of assault under s. 352 of the Indian Penal Code. On the day fixed for the trial, the complainant and the accused were absent. Whereupon the magistrate acquitted the accused and ordered the complainant to pay compensation to each accused. This order was wrong, as there was absolutely no evidence to prove that the complaint was false and frivolous. The mere absence of the complainant did not warrant such inference. On the other hand, the absence of all parties might indicate that the accused had compromised with the complainant. The order is set aside and the money, if levied, will be repaid to the complainant.

Order set aside. Compensation money to be refunded.

Before Raja Dharma Pravina T. R. A. Thumboo Chetty, Chief Judge, A. Ramachendra Iyer, Judge.

1893 November 14.

THE GOVERNMENT v. SIDDALINGA.*

Jurisdiction—Code of Criminal Procedure (Act X of 1882) Sch. II, as amended by Act X of 1886, s. 17—False charge of offence punishable with seven years' imprisonment—Notice through lawyer.

The offence of theft in a dwelling-house (Penal Code s. 380) is, by the amendment made in Sch. II of the Code of Criminal Procedure, by Act X of 1886, s. 17, triable by a first-class Magistrate.

If an act is theft in the eye of the law, a notice given through a lawyer does not affect the liability of the offender.

* Criminal Reference No. 67 of 1893-94 by Mr. C. Sreenivasa Iyengar, District Magistrate of Chitaldroog, dated the 3rd day of October 1893 against judgment in Criminal Case No. 71 of 1892-93 of the First-class Magistrate of Chitaldroog, dated the 3rd day of October 1893.

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GOVERNMENT v. SIDDALINGA.

The Order of the Chief Court (THUMBOO CHETTY, C. J., and RAMACHENDRA IYER, J.) was as follows:—

Schedule II to the Code of Criminal Procedure has been amended so as to invest a first-class magistrate with power to try the offence of bringing a false charge, if the offence charged would make the offender liable to seven years' imprisonment. The charge was, that the complainants had committed theft in a dwelling-house. As the punishment was seven years' imprisonment, the magistrate had jurisdiction and we see no reason to interfere, more particularly as the accused pleaded guilty.

We may remark that the judgment does not set out the evidence which proved that the complaint was a false one. The accused gave a notice through a lawyer and afterwards made a complaint. If the act was theft in the eye of the law a notice given through a lawyer did not affect the liability of the offender.

Conviction upheld.

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CIVIL AND MILITARY STATION OF BANGALORE.

CIVIL.

REGULAR APPEALS.

Before Colonel P. D. Henderson, C. S. I., Resident.

HYTHAN AND OTHERS (PLAINTIFFS) *v.* APPAVOO CHETTY AND OTHERS (DEFENDANTS).*

1893 *July* 29.

Hindu Law—Undivided family—Liability of heirs—Surety.

The plaintiffs held contracts for the supply of the coffee-shop and canteen of the Field Battery at *B* and employed one *R C* as their agent in respect thereof. *R C* died and his accounts showing a considerable deficiency due by him to the plaintiffs, the latter sued his parents, widow and children to recover the same. *Held,* that the heirs of a Hindu are liable only to the extent of assets of the deceased in their hands and therefore the parents, widow and children of *R C* were not personally liable. *Further,* that as the plaint did not disclose that the father was regarded as surety of *R C* or was sued as such, he could not be held responsible in that capacity.

Mr. *Travers-Drapes* for the appellants.

Mr. *Ramaswamy Chetty* for the respondents.

The Judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows :—

The suit was to recover Rs. 2,869-15-9 from the defendants as the legal representatives of one Rudramoorty Chetty who was the plaintiffs' agent in the canteen and coffee-shop transactions which they carried on with Field Battery No. 61 in the Civil and Military Station of Bangalore. He died in July 1891, and on examination of his accounts the plain-

* Appeal No. 19 of 1892, against original decree No. 2010 of 1891 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 27th day of July 1892.

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1893

HYTHAN v. APPAVOO CHETTY.

tiffs discovered a deficiency to the extent of the plaint amount which they seek to recover from his parents, widow and children.

The defendants pleaded that they were not in possession of any property of the deceased and denied their liability to the plaint claim.

The District Judge gave a decree for Rs. 2,469-15-9 against the assets of the deceased. In this appeal which has been preferred by the plaintiffs it is contended that the defendants are personally liable to them inasmuch as they (defendants) and the deceased were members of an undivided Hindu family and that at all events defendant No. 1 ought to have been held liable as surety for the deceased.

It is not alleged in the plaint that the defendants or any of them misappropriated the amount or that they are personally liable to make it good. They are sued as representatives of the deceased and relief is asked for against them as such. It is now settled law that the heirs of a Hindu are liable for his debts only to the extent of his assets. The District Judge was therefore perfectly right in directing the defendants to pay the decreed amount out of the assets of the deceased in their hands.

There is nothing in the plaint to show that the plaintiffs regarded defendant No. 1 as surety for the deceased and that they sued him in that capacity.

The decree of the lower court is therefore confirmed and this appeal is dismissed with costs.

Appeal dismissed with costs.

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Before Colonel P. D. Henderson, C. S. I., Resident.

1893
August 27.

HAFIZ PESH IMAM ABDUL KAREEM SAIB (PLAINTIFF) *v.* MEER ISMAIL SAIB AND OTHERS (DEFENDANTS).*

Mutwali—Power to appoint and dismiss Pesh Imam—Construction of word "Mudami."

Held that, it being clear the plaintiff was appointed Pesh Imam by the Kazi and the community, it must be conceded they had the power also to dismiss him.

Also, the word *Mudami* in the document of appointment should not be construed as "eternal" or meaning that the appointment was to last for life. It should be given the current meaning of "continuously" and its place in the construction of the sentence shows that it referred to the manner in which the duties were to be performed and not to the duration of the term of office.

Mr. *Evers* for the appellant.

Messrs. *Lubeck* and *Mahomed Ahamad* for respondents Nos. 1, 2, 4, 5, 6, 7 and 8.

Respondent No. 3 in person.

The Judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

The appellant brought this suit (1) for a declaration that he is the Pesh Imam of the Kaziwada Mosque in the Civil and Military Station of Bangalore subject to the control and orders of the Mutavalli, (2) for an injunction restraining the defendants from interfering in any way with the performance of his duties as Pesh Imam, and (3) for Rs. 50 as damages for having interfered with his duties and for having had him temporarily removed from office.

The defence was that the plaintiff having been dismissed by the late Kazi (Gholam Moideen Sharif) with the consent of the Jamayet for irreligious behaviour and misconduct, he has no cause of action

* Appeal No. 1 of 1893 against original decree No. 965 of 1891 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 19th day of November 1892.

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ABDUL KAREEM SAIB v. MEER ISMAIL SAIB.

against the defendants and is not entitled to any relief, and that Mahamed Kasim was not the Mutwalli of the mosque.

The District Judge found that the plaintiff was not a fit person to hold the office of Pesh Imam, that he had rendered himself obnoxious to the Kaziwada community by certain acts of irreligious and impiety, and that having been dismissed for these reasons by the Kazi and the community which had entertained him, he had no cause of action and the suit was not maintainable. Accordingly he dismissed the suit with costs.

It is contended in this appeal that under *Ex.* 1 the tenure of the plaintiff's office was to last for life, that there being a Mutwalli who manages the affairs of the mosque, the power of appointing and dismissing a Pesh Imam rests with him and not with the Kazi and the congregation, that the respondents are only obstructionists and not representatives of the community and that the appellant was never dismissed.

Several authorities on Mahomedan law were cited by both sides at the hearing in support of their respective contentions. But I do not consider it necessary for the purpose of this case to examine either the dicta of these authorities or their validity. It is clear from *Ex. 1*, which is admitted, that the late Kazi Gholam Moideen Sherif and the community of the Kaziwada Mosque appointed the plaintiff to the office of Pesh Imam in 1879 at a monthly salary of Rs. 10; and his deposition given as a witness in O. S. No. 274 of 1889 on the file of the District Judge shows that he worked under the

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orders of the said Kazi Gholam Moideen and the community. If they had the power to appoint, it must be conceded that they had the power to dismiss him, provided that the dismissal was not contrary to the terms of the contract of service.

It was argued that the word "*mudami*" in *Ex.* 1 means "eternal" and that therefore the plaintiff's appointment was intended to last for life. But I cannot accept the word in that sense. It means in the current acceptation of the term "continuously" and its place in the construction of the sentence shows that it refers to the manner in which the duties are to be performed and not to the duration of the term of office. There is therefore nothing, as far as I can see in *Ex.* 1, to prevent the employers from discharging the plaintiff when they please. That he was dismissed is admitted by himself and it is further borne out by the fact that they appointed another man in his place, and that, in order to avoid a breach of the peace, the District Magistrate appointed a third person to act as Pesh Imam. There is nothing to show that the Jamayet did not and do not acquiesce in the plaintiff's removal from office.

Respondents Nos. 3 and 6 have filed a cross objection under s. 561 of the Code of Civil Procedure stating that the District Judge has failed to record a finding on the sixth issue. For the purpose of this case it is not necessary to decide that issue.

The decree of the Lower Court is therefore confirmed and this appeal is dismissed with costs.

Appeal dismissed with costs.

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1893
Sept. 16.

BANSILAL RAMARATHAN v. MAHOMED SALIA SAIB.

Before Colonel P. D. Henderson, C. S. I., Resident.

BANSILAL RAMARATHAN (PLAINTIFF) v. MAHOMED SALIA SAIB AND OTHERS (DEFENDANTS).*

Mahomedan family—Sale of immovable property—Duty of purchaser to enquire into title—Compensation—Limitation—Limitation Act (XV of 1877) Sch. II Art. 120—Partition—Specific Relief Act (I of 1877) s. 12—Transfer of Property Act (IV of 1882) s. 44—Costs.

Where the widow of a Mahomedan sold some immovable property belonging to the estate of her deceased husband to her son-in-law, who transferred such property to one *J S* informing the latter at the time that the property had belonged to his deceased father-in-law, *Held* that, having had such notice, it was the duty of *J S* to have ascertained who the representatives of the deceased proprietor were and whether they had all acquiesced in the sale. Not having done so, and there being nothing to show that they were even aware of the sale, all that passed to a purchaser at court-sale in execution of a decree against *J S* was the interest of *J S* and of his mother-in-law in the said property.

Further that, assuming the house on the land to have been built by the mother-in-law, it must have been so prior to the sale by her to her son-in-law, which took place in 1885, more than six years before the suit. The plaintiff's (court-purchaser's) claim for use and occupation would therefore be barred under the Limitation Act (XV of 1877) Sch. II Art. 120.

Also held, that the plaintiff could not claim a specific share of the house but only the money value of the 299/768th share he was declared entitled to. It would be impossible to divide the house so as to give him this share. Where a dwelling-house cannot be divided without destroying the intrinsic value of the whole house, the person claiming a share thereof must content himself with its money value. Section 44 (second paragragh) of the Transfer of Property Act (IV 1882) provides that when the transferee of a dwelling-house is not a member of the family, he shall not be deemed to be entitled to joint possession or other common or part enjoyment of the house. This provision, which is not opposed to any rule of Mahomedan law within the meaning of s. 2 (*d*) of the Act, also militates against the plaintiff's claim to a specific share.

* Appeal No. 6 of 1893 against original decree No. 2638 of 1891 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 24th day of Dece mber 1892.

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Further, as to costs, the principle is that costs should follow the result and the plaintiff is therefore entitled to proportionate costs unless there are special circumstances disentitling him to the same. He was a purchaser at a court-sale. The defendants did not restrict their claims to their respective shares, but impugned the fact and validity of the original sale in its entirety and set up a false plea of gift of the whole house. Under such circumstances they should pay the plaintiff his proportionate costs in the lower court and bear their own. As the respondents (defendants) resisted the whole of the plaintiff's claim even in appeal, each party should bear their own costs of the appeal.

Mr. *Mooroogesa Moodelliar* for the appellant.

Mr. *Evers* for respondents Nos. 1, 5, 6, 7 and 8.

Messrs. *Lawrance* and *D'Cruz* for respondents Nos. 2 and 4.

The Judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

The following are the facts of the case:—Nanoo Bee, the widow of Duffadar Hussain Sahib, conveyed a house to her son-in-law, Chowdry Shaik Madar Saib (defendant No.3), under *Ex. A*, dated 12th July 1885, and he transferred it to one Jalal Sharif by the conveyance deed *Ex. B* which is dated 3rd August 1885. In execution of a decree obtained by the present plaintiff against the said Jalal Sharif the house was attached, whereupon the representatives of Pacha Bee and Kathija Bee, the daughters of Duffadar Hussain Sahib, preferred a claim to it, but the right, title and interest of Jalal Sharif was ordered to be sold and the property was purchased at court-sale by the plaintiff, who brought this suit to recover the house and Rs. 75 as compensation for its use and occupation.

Defendant No. 1 is the husband of Pacha Bee who is dead and defendants Nos. 5 to 8 are her

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children. Defendant No. 3 is the husband of Kathija Bee who is also dead and defendant No. 2 is her daughter. Defendant No. 4 is the husband of defendant No. 2.

All the defendants, except defendant No. 3, pleaded that the alleged sale by Nanoo Bee was false and fraudulent, and that even if true it was inoperative as the house had originally belonged to Duffadar Hussain Sahib and had been given by Nanoo Bee to her daughters Pacha Bee and Kathija Bee prior to the alleged sale. Defendant No. 3 admitted the sale to Jalal Sharif but stated that the house belonged to Duffadar Hussain Sahib and that he was not aware of the rights of Pacha Bee and Kathija Bee when he obtained the sale deed from Nanoo Bee. He therefore supported as far as he could the contentions of the other defendants.

The District Judge found that the sale to Jalal Sharif was valid only to the extent of Nanoo Bee's and defendant No. 3's shares in the house and gave a decree for the value of 299/768th share in the property rejecting the rest of the plaintiff's claim and directing each party to bear his or her own costs of the suit.

The points for consideration in this appeal, which has been preferred by the plaintiff, are :—(1) Whether the suit-house originally belonged to Duffadar Hussain Sahib or formed the separate property of Nanoo Bee? (2) Supposing that it belonged to Duffadar Hussain Sahib, was Nanoo Bee allowed to hold herself out as its owner and to deal with it in such a manner as to estop the defendants from

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questioning the validity of the sale to defendant No. 3? (3) Did she rebuild the house at her own cost, and if so, is the plaintiff entitled to claim from the defendants the value of the improvements in proportion to their shares? (4) Is the plaintiff entitled to a specific share in the house or to its money value only? (5) Is the District Judge's order as to costs correct?

I have no doubt that the District Judge's finding on the first point is correct. The plaintiff's own witnesses state that the house belonged to Duffadar Hussain Sahib, and this fact is recited in *Ex. B.* Duffadar Hussain Sahib is said to have died twenty or thirty years ago when his daughters were minors. The mere fact of the house standing in Nanoo Bee's name in the Municipal Register cannot therefore be accepted as raising a presumption in her favor.

Exhibits E and *F* show that in 1885 Nanoo Bee obtained permission of the Municipality to rebuild the house. That it was rebuilt is an admitted fact, but whether by her or by her daughters is open to doubt. The District Judge finds that both the daughters died previous to 1885. If so, the present building must have been re-erected by Nanoo Bee, but who supplied the money for the building expenses is a point upon which there is no evidence. Assuming that she had it rebuilt at her own cost, that does not constitute her sole owner to the exclusion of her daughters' representatives, and the person to whom she transferred it is no other than her own son-in-law, defendant No. 3, who must have been aware that there were others interested

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in it. When it passed out of his hands to Jalal Sharif he made the latter understand that it belonged to Duffadar Hussain Sahib. Having had such notice it was the duty of Jalal Sharif to have ascertained who Hussain Sahib's representatives were and whether they had all acquiesced in the sale. There being nothing to show that they were even aware of the sale by Nanoo Bee, they are perfectly entitled to assert their rights and question the validity of the sale.

As already observed it is doubtful if Nanoo Bee rebuilt the house at her own cost. Assuming, however, that she did so, the plaintiff's claim for compensation would be barred by limitation. The re-erection took place before the date of *Ex. A* and the suit was instituted in December 1891. It is doubtful which of the Articles of the Limitation Act would apply to the case. Even assuming that the period of six years allowed by Article 120 of Sch. II applies to a claim of this kind, the claim would be barred, as more than six years had elapsed before the institution of the suit.

The appellant's advocate contends that his client is entitled to a specific share in the house and relies on s. 12 of the Specific Relief Act in support of his contention. But that section applies only as between parties to a contract or their representatives. In this case the defendants (the 3rd excepted) who claim, not through, but independently of, Nunnoo Bee were no parties to the sale by her. The second paragraph of section 44 of the Transfer of Property Act provides that when the transferee of a share of a dwelling house belonging to

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an undivided family is not a member of the family, he shall not be deemed to be entitled to joint possession or other common or part enjoyment of the house. I suppose this provision of the law would govern the case provided, as it is not opposed to any rule of Mahomedan law within the meaning of s. 2 (*d*) of the Act. The share which the appellant has been found entitled to is 299/768th. It is impossible to divide the house so as to give him this share. Where a dwelling house cannot be divided without destroying the intrinsic value of the whole house, the person claiming a share thereof must content himself with its money value. In this case not only would a division destroy the value of the house but it is also impossible.

As regards the plaintiff's costs in the lower court I think the District judge's order must be modified. On the principle that costs should follow the result, the plaintiff is, I think, entitled to proportionate costs unless there are special circumstances disentitling him to the same. He was a purchaser at a court-sale. The defendants did not restrict their claims to their respective shares but impugned the fact and validity of the original sale in its entirety and set up a false plea of gift of the whole house in favor of Pacha Bee and Katija Bee. I think in these circumstances it is but fair that they should pay the plaintiff his proportionate costs in the lower court and bear their own.

Defendants Nos. 2 and 5 and defendant No. 1 on behalf of himself and defendants Nos. 6, 9 and 8, have filed cross-objections under s. 561 of the Code

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of Civil Procedure objecting to the lower court's findings and decree so far as they are against them.

First of all it is contended that the genuineness of *Ex. A* has not been proved and that, if genuine, it is not valid for want of consideration. Defendant No. 3 has sworn to its genuineness and *Ex. D* is the sworn deposition of one of its attesting witnesses. It has also been duly registered. In these circumstances the burden of proving that it is not genuine lies upon the defendants, who have failed to discharge it.

As regards the contention that there was no consideration for *Ex. A*, defendant No. 3 seems to support it. But it must be remembered that he is colluding with the other defendants who are his near relatives and that he makes this statement long after parting with all interest in the house. If the defendants succeed in the suit, his daughter, defendant No. 2, also gets a share in the house. Granting that Nanoo Bee executed *Ex. A* in favor of defendant No. 3 without receiving any consideration therefor, she would be estopped, if she were living, from pleading want of consideration as against Jalal Shariff and the plaintiff, who are *boná fide* purchasers for value without notice. She took no steps to get it cancelled and not only was defendant No. 3 left in possession of *Ex. A*, but the Municipal docket and the plan of the house which she appears to have looked upon as her title-deeds were also handed over to him with *Ex. A*, and the writer of *Ex. B* swears that she attested *Ex. B*. The defendants are therefore now debarred from questioning the validity of

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Ex. A, so far as it affected her interest in the plaint property.

The second contention of the respondents is that Pacha Bee and Kathiza Bee having allowed Nanoo Bee to sell another of her husband's houses in order to meet the expenses of her pilgrimage to Mecca, she in return renounced all her rights in the suit-house in their favor. But there is not a scrap of paper to evidence this. If it were a fact, she would have executed a proper document in that behalf or her daughters would have secured one in her life-time seeing that she died only recently. Such being the case the oral evidence as to the alleged gift is not entitled to any value.

The respondents' objections are therefore disallowed and it is ordered in modification of the lower court's decree that the defendants should pay the plaintiff his proportionate costs in that court and bear their own. In other respects the decree is confirmed.

As the respondents resisted the whole of the plaintiff's claim even in appeal, I direct that each party do bear his or her own costs of the appeal.

Appeal dismissed. No costs.

Before Colonel P. D. Henderson, C.S.I., Resident.

POORNAM CHUND AND ANOTHER (PLAINTIFFS) v. LIEUTENANT C. B. BOWEN (DEFENDANT).*

1893 Nov. 11.

Negotiable Instruments Act (XXVI of 1881) ss. 4, 79 and 80—Separate promissory note for interest deducted in advance—Consideration—Equitable relief—Interest—Costs.

Where the defendant being fully aware of the nature of the

* Appeal No. 5 of 1893 against original decree No. 1998 of 1892 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 23rd day of December 1892.

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POORNAM CHUND v. BOWEN.

transaction and entering into the agreement with his eyes open, consents to interest being deducted in advance and agrees to take it back as a separate loan for which he gives a second promissory note, he has no right to any relief from the law.

A promissory note payable by monthly instalments which carries interest for eight months only from date of execution, but is silent as to subsequent interest, falls within the definition of a promissory note given in s. 4 of the Negotiable Instruments Act (XXVI of 1881) and would carry interest at the contract rate under s. 79 of the same Act until tender or realisation.

Plaintiffs who partially succeed on appeal must pay the defendant's costs in the original court on the amount disallowed and on appeal should receive from the respondents costs on the amount allowed in excess of what was decreed by the lower court.

Messrs. *Sambasivia* and *Lubeck* for the appellants.

Mr. *Evers* for the respondent.

The Judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

The plaintiffs brought this suit to recover Rs. 829-15-6, being balance of principal and interest due on two promissory notes and two chits. The defendant's plea was that one of the promissory notes, *Ex. B* which is for Rs. 400, having been executed for the interest on the Rs. 2,000 lent under *Ex. A*, which the plaintiffs deducted in advance, was invalid for want of consideration and that he had paid Rs. 2,452 in all in full satisfaction of their claim. The District judge held that *Ex. B* was invalid for want of consideration and, treating it as a nullity, he found that Rs. 305 was due to the plaintiffs and gave a decree for that amount with proportionate costs.

The plaintiffs have appealed from that decree and the defendant has filed a cross-objection under s. 561 of the Code of Civil Procedure. The points for consideration are:—

(1)—Whether *Ex. B* was executed for the inter-

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est on the Rs. 2,000 deducted in advance, and if so, whether it is valid in law? (2)—Whether the plaintiffs are entitled to interest on *Ex. A*, and if so, from what date? (3)—Whether the plaintiffs can claim interest on the amount advanced on *Ex. D*? and (4)—Whether the defendant is entitled to his proportionate costs on the amount disallowed by the lower court?

I feel no doubt that the defendant's version of the circumstances under which he executed *Ex. B* is true and I believe that it was executed not for money actually lent but for the interest on the Rs. 2,000 which the plaintiffs wanted to deduct in advance. The fact that, though the stamp on which *Ex. A* was drawn up was more than sufficient to cover Rs. 2,400 yet *Ex. B* was executed on a separate stamp on the same date and the oral evidence in the case support this conclusion. But I cannot agree with the District judge in treating *Ex. B* as an invalid document. The defendant was fully aware of the nature of the transaction and entered into the agreement with his eyes open. He has therefore no right to the protection of the law. *Mackintosh* v. *Wingrove*(1). He did consent to interest on *Ex. A* being deducted in advance and agreed to take it back as a separate loan. If he had not so agreed, the plaintiffs could have lent the sum to others on interest. I therefore hold that *Ex. B* is valid and binding on the defendant.

Ex. A carries interest for eight months from the date of execution. It is silent about subsequent interest and the principal is repayable by monthly

(1) I. L. R. 4 Cal., 137.

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instalments of Rs. 100 each. The document falls within the definition of a promissory note as given in s. 4 of the Negotiable Instruments Act (XXVI of 1881) and whether it is payable on demand or otherwise, it would carry interest under s. 79 of the Act until tender or realisation.

The defendant's advocate contended that s. 80 of the Act applied to the case: but that section applies only to promissory notes where no rate of interest is specified. Section 79 appears to be general and applies to all promissory notes when interest is made payable on them, whether for a limited period or not. There being nothing in *Ex. A* to show that the amount advanced on it was not to carry interest after eight months, I must hold that under s. 79 the document carries interest at 24 per cent. per annum until repayment of the principal. But the Rs. 400 which the plaintiffs deducted as interest in advance must be deducted from the amount of interest to be calculated on *Ex. A.* For they cannot deduct future interest from the principal and at the same time charge interest on the latter.

There is no stipulation to pay interest on *Ex. D*, and the plaintiffs' advocate waives the claim it being a small sum of about Rs. 10. Therefore Rs. 410 ought to be deducted from the plaint amount and the plaintiffs will be entitled to a decree for the remainder, viz., Rs. 420 and for interest thereon at 6 per cent. per annum from date of the decree of the original court until payment and to proportionate costs.

As the plaintiffs have only partially succeeded,

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they must pay the defendant's costs in the original court on the amount disallowed, *i. e.*, his advocate's fee on Rs. 410 and the whole of the rest of his costs. The decree of the District judge is modified to the above extent.

As regards the costs of the appeal I direct that the respondent should pay the appellants' costs on the amount allowed in excess of what had been awarded by the lower court and that they should pay his costs on the amount disallowed. A decree will issue accordingly.

Decree modified. Proportionate costs.

Before Colonel P. D. Henderson, C.S.I., Resident.

RABCA BEE (PLAINTIFF) *v.* HAJEE KADER MOHIDEEN AND OTHERS (DEFENDANTS).*

Sept. 23.

Evidence Act (I of 1872) ss. 33 and 43—Admissibility of evidence taken in previous suit.

In an original suit certain property was attached before judgment. A claim preferred to it was rejected and the unsuccessful claimant filed a regular suit. *Held* that, there being nothing before the court to shew that the proceedings in the original suit were admitted by the lower court or that the opposite party consented to their being admitted as evidence in the subsequent suit, the court could not look into such evidence in coming to a conclusion in the suit of the claimant.

On the facts, *Held further* that the lower court was right.

Messrs. *Lawrance* and *D'Cruz* for the appellant.
Mr. *Lubeck* for the respondents.

The Judgment of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

The suit out of which this appeal has arisen was brought to set aside the District Judge's

* Appeal No. 4 of 1893 against original decree No. 84 of 1892 of Mr. P. S. Krishna Rao, District Judge of the Civil and Military Station of Bangalore, dated the 24th day of December 1892.

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RABCA BEE v. HAJEE KADER MOHIDEEN.

order in Miscellaneous Case No. 369 of 1891 on his file and for the release of certain property from attachment.

The plaintiffs in Original Suit No. 2051 on the file of the District judge, which they brought against one Osman Khan on the 24th September 1891 obtained an order for attachment before judgment of the shop goods consisting of cloths, &c., of the said Osman Khan and did attach the same on the 19th October. Then one Abdul Wahab as the agent of Rabca Bee, the present plaintiff, intervened, and claimed the goods under a purchase alleged to have been made by him on her behalf, but the claim was rejected. Hence this suit.

The plaintiff's case is that Osman Khan transferred to her his stock-in-trade and outstanding debts under a sale-deed dated the 13th October 1891 in repayment of a loan for Rs. 6,000 which he had borrowed from her some years before, and that, at that time of the attachment, the goods in question were in the possession of Abdul Wahab on her behalf.

The defendants pleaded (*inter alia*) that they were not aware of the alleged sale to the plaintiff, and that the sale, even if true, was a fraudulent and colorable transaction and therefore not binding on them.

The important issue in the case is whether there was a *bonâ fide* sale in favour of the plaintiff and if so, whether it is binding on the defendants. The District Judge's finding on this point was against the plaintiff, whose suit was accordingly dis-

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missed with costs. The plaintiff has appealed from that decree.

There is a preliminary point for decision, and that is whether the evidence in O. S. No. 2051 of 1891 ought to be considered in this case. It was urged by the Advocate for the appellant that it was understood that the lower court would consider that evidence in deciding the present suit. No affidavit was filed by the appellant under s. 137 of the Code of Civil Procedure, and there is nothing on the record to show that the proceedings in O. S. No. 2051 were admitted by the lower court or that the opposite party consented to their being admitted as evidence in this case. Under s. 43 of the Evidence Act (I of 1872) the judgment in that suit would be inadmissible as evidence in this case unless it is relevant under some other provision of the Act, and such relevancy has not been made out nor can the depositions of witnesses in that suit be treated as evidence in this case except under the circumstances referred to in s. 33 of the Act, and the existence of such circumstances has neither been alleged nor proved. The court cannot, therefore, look into the evidence in O. S. No. 2051 in coming to a conclusion in the present case.

After a careful perusal of the evidence I see no reason to doubt the correctness of the conclusions arrived at by the District Judge. The existence of the alleged loan of Rs. 6,000 has not been proved. It is admitted that the loan was evidenced by a bond; but that bond has not been produced. Again, no attempt has been made by the plaintiff to cause the

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production of Osman Khan's account books which should contain entries about the loan and the payments of interest thereon, if those were true. As the plaintiff and Osman Khan are related to each other, the plaintiff could have experienced no difficulty in getting at the books. If the sale were a *bona fide* transaction, the discrepancy pointed out by the District Judge in the statements of the plaintiff and Abdul Wabab as to the mode in which the payment of Rs. 1,200, part consideration for the sale, is said to have been made, and as to the exact amount of the balance, would not have existed. These and other circumstances referred to in the lower court's judgment, which need not be repeated here, are sufficient to show that the sale to the plaintiff was a fraudulent and colorable transaction got up in anticipation of an attachment by the defendants, and that Abdul Wahab's possession at the time of attachment was for and on account of Osman Khan.

In this view of the case it is unnecessary to consider whether Abdul Wahab had previous authority from the plaintiff to obtain transfer of the goods on her behalf and, if he had no such authority, whether subsequent ratification on her part would not have the effect of validating his act.

The cases of *Motilal Ravichand* v. *Utam Jagjivandas*(1) and *Gopal* v. *Bank of Madras*(2) quoted by the appellant's advocate are distinguishable from the present case inasmuch as it was found there that the sales were *bonâ fide* and for consideration.

(1) I. L. R. 13 Bom., 434. (2) I. L. R. 16 Mad., 397.

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The decree of the lower court is therefore confirmed and this appeal is dismissed with costs. 1893

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Appeal dismissed with costs.

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CIVIL REVIEW.

Before Colonel P. D. Henderson, C.S.I., Resident.

HAZARAM BEE AND OTHERS (PLAINTIFFS) *v.* KOOLSUM BEE AND OTHERS (DEFENDANTS).* 1893 *July 26.*

Award—Grant of relief greater than sought for by plaintiff—Separate suit.

Where the plaintiff's cause of action had merged in an award, the validity of such award should not be gone into in a suit on the original cause of action which formed only a portion of the subject-matter of such award. To do so would give the plaintiff greater relief than was sought by the suit.

The general legal operation of the award should be left for a separate suit and only that portion of it dealt with that related to the claim advanced in the suit under appeal.

Messrs. *Lawrance, D'Cruz* and *Lubeck* for the petitioners.

Messrs. *Travers-Drapes* and *Evers* for the counter-petitioners.

The Order of the Resident (*Colonel* P. D. HENDERSON) was as follows :—

This is an application for review of this court's judgment and decree in *Hazaram Bi* v. *Koolsum Bi and others*(1).

The District judge held that there was no valid and binding award and decreed to the plaintiff her 1/16th share in her husband's properties and Rs. 750 on account of her dower.

* Civil Review No. 1 of 1893 to review the order of the Resident's Court of the Civil and Military Station of Bangalore, in R. A. No. 18 of 1892, dated the 6th day of December 1892.

(1) 15 M. L. R., 381.

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This court found that the award of the 21st September 1890 was valid and binding on the parties and therefore dismissed the suit but without prejudice to the plaintiff's rights under the award and declared the sale of the bungalow in Cole's Park in favor of defendants Nos. 7 and 8 to be wholly invalid as the bungalow vested, according to the legal operation of the terms of the award, in the plaintiff and her two daughters.

It is pointed out that having dismissed the plaintiff's suit on the ground that her rights were merged in the award, this court ought to have left the question of the validity of the sale of the bungalow and the legal effect of the award to decided in a separate suit which she might bring on the award and that in setting aside the sale *in toto* this court has granted to the plaintiff greater relief than she had asked for in the plaint.

One of the issues in the case was in effect, whether there was a valid award and, if so, what were its provisions and were they binding on the parties? It was in connection with this issue that this court found that the award of the 21st September was valid and binding on the parties and that according to the legal effect of that award the bungalow vested in the plaintiff and her two daughters. Objection is taken to the latter part of the finding on the ground that there was no direct issue as to whether defendant No. 5 failed to fulfil the terms of the award, and that consequently he was not able to prove that the bungalow continued to vest in him.

There was a prayer in the plaint to set aside the

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sale of the bungalow. It was not stated that the sale was to be set aside only to the extent of the plaintiff's share in the property and the District judge appears to have dealt with the question of the validity of the sale generally and not in reference to the plaintiff's share only. But the implied effect of his decree was to set aside the sale only so far as it affected the plaintiff's share in the property. All the persons interested were parties to the suit and had ample opportunities of adducing proof as to the validity or otherwise of the sale according to their respective contentions. But this court's finding on the point is open to the technical objection that the plaintiff has been given greater relief than she sought, and that her cause of action having merged in, and been superseded by the award, the question ought to have been left to be tried in a separate suit which she might bring on the award.

The review applied for is therefore granted. The costs of this application will be costs in the appeal.

Review granted.

CIVIL MISCELLANEOUS.

Before Colonel P. D. Henderson, C.S.I., Resident.

SOOB ROW (RESPONDENT).*

1893.

Code of Civil Procedure (Act XIV of 1882), ss. 34 and 559—Parties—Addition of respondents.

Defendants who are interested in an appeal may be added as respondents under s. 559 of the Code of Civil Procedure (Act XIV of 1882) although they may not have appealed from the original decree.

* Civil Miscellaneous Petition No. 15 of 1892 presented by Soob Row, respondent in R. A. No. 13 of 1891.

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SOOB ROW.

Messrs. *Lawrance* and *D'Cruz* for the petitioner.

Mr. *Alasingarachar* for defendant No. 6.

Mr. *Soobbaroya Moodelliar* for defendants Nos. 2, 3 and 4.

The only point for determination in this application is whether defendants Nos. 1, 2, 3, 4 and 6 in this suit before the lower court ought to be added as parties to the appeal in this court.

The above defendants seem to contend that they are not liable to be added as parties at this stage of the appeal, and defendant No. 6 further contends that it is not necessary to join him as a party as he received no part of the rents claimed by the plaintiff.

The advocate for defendants Nos. 2, 3 and 4 quotes s. 34 of the Code of Civil Proeedure in support of their contention. But that section refers to objections on the ground of want of parties, &c., in the court of the first instance, while the first application has been made under s. 559 of the Code, which empowers the appellate court to add as respondent in appeal any person who was a party to the suit in the original court and who has an interest in the result of the appeal, but has not been made a party to it. In a similar case the Calcutta High Court has held that this could be done. *Manickya Moyee* v. *Boroda Prosad Mookerjee and another*(1). The ruling of the Allahabad High Court in *Atma Ram* v. *Balkishen and others*(2) appears to be conflict with the decision of the Calcutta High Court. But in the present case the defendants who oppose the application are interested in the result of the appeal

(1) I. L. R. 9 Cal., 362. (2) I. L. R. 5 All., 266.

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though they did not appeal from the original decree; for defendant No. 5 appealed from the whole decree and objected to the division of the bungalow as ordered by the lower court. Whether the bungalow ought to be divided or only the money value of the plaintiff's share should be given to him is a question in the determination of which all the defendants, it seems to me, are interested.

It is true that the application had not been made before the decree was passed, but review of the decree and judgment has been granted, and the appeal has to be heard over again. The court has therefore in my opinion power to make the defendants, respondents to the appeal under s. 559 of the Code.

It is accordingly ordered that the names of defendants Nos. 1, 2, 3, 4 and 6 be placed on the record as additional respondents.

CRIMINAL REFERENCE.

Before Colonel P. D. Henderson, C.S.I., Resident.

GOVERNMENT *v.* ARNACHELLUM MOODELLIAR (ACCUSED).*

1893
March 23.

Affidavit—Code of Criminal Procedure (Act X of 1882) ss. 523, 74, 526 and 539—Indian Penal Code (Act XLV of 1860) s. 199.

A written statement was filed by an accused person in proceedings under s. 523 of the Code of Criminal Procedure (Act X of 1882) and was accompanied by an affidavit. Such affidavit not being one of those admissible in evidence under ss. 74 and 526 of the Code and to be acted upon by a criminal court does not come within the meaning of s. 199 of the Indian Penal Code and does not subject the maker thereof to prosecution under s. 193 of the Penal Code.

* Reference No. 1 of 1893 made by the District Magistrate of the Civil and Military Station of Bangalore, in Criminal Case No. 42 of 1893, on the file of the Second Magistrate.

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v.
ARNACHELLUM MOODELLIAR

The District Magistrate of the Civil and Military Station of Bangalore submits for revision under s. 438 of the Code of Criminal Procedure the proceedings of the acting Second Magistrate of the Station in Criminal Case No. 42 of 1893, in which the accused who was prosecuted for offences under ss. 193 and 199 of the Indian Penal Code was discharged under s. 253 of the Code of Criminal Procedure.

In certain proceedings held by the District Magistrate under s. 523 of the Code of Criminal Procedure the accused filed a written statement together with an affidavit. It was alleged that certain statements contained in the affidavit as to the nature of a previous enquiry before the Second Magistrate were false and sanction was obtained from the District magistrate to prosecute the accused for making a false declaration.

I agree with the District magistrate in his opinion that the acting Second Magistrate was wrong in accepting as good the accused's plea that because the affidavit was in English he did not know its contents and because it was not acted upon, therefore he is not guilty. But I think the second Magistrate was right in holding that the affidavit in question is not one which a court or public servant is bound or authorized by law to receive as evidence of any fact.

Under ch. XXI of the Code of Civil Procedure a civil court may order that any particular fact or facts be proved by affidavit, and under certain other sections of the same Code other facts may be

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proved by affidavit. But under the Code of Criminal Procedure it is only the affidavits referred to in ss. 74 and 526 of that Code that are admissible in evidence and can be acted upon by a criminal court. Sec. 539 of the Code points out the officers before whom an affidavit to be used before a High Court is to be sworn or affirmed.

The proceeding in which the affidavit in question was filed was one under the Code of Criminal Procedure. The affidavit does not therefore come within the meaning of a declaration as referred to in s. 199 of the Indian Penal Code, and the accused is not liable to prosecution either under that section or under s. 193. This is the view taken by the Calcutta High Court in a somewhat similar case. *In the matter of the Petition of Iswar Chunder Guha* (1).

I therefore decline to interfere with the order of discharge passed by the Second Magistrate.

——o——

CRIMINAL REVISION.

Before Colonel P. D. Henderson, C.S.I., Resident.

In re MARIMOOTHOO (COMPLAINANT.)*

1893 *January* 20.

Indian Penal Code (Act XLV of 1860) s. 504—Insult—Construction of language complained of.

Whether language complained of as insulting under s. 504 of the Indian Penal Code constitutes an offence under that section, is a matter that must be decided by a court with reference to the

* Criminal Revision Petition No. 10 of 1892 against the order of Messrs. Aga Abdula and V. Gungathara Chetty, Honorary Magistrates, Civil and Military Station of Bangalore, in Criminal Case No. 1177 of 1892, dated the 19th day of August 1892.

(1) I. L. R. 14 Cal., 653.

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In re MARIMOO-THOO.

class of society to which the parties belong: and also after consideration of the character of the complainant and the relations existing between the parties.

Mr. *Evers* for the petitioner.

Mr. *Travers-Drapes* for the counter-petitioner.

The Order of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

The complainant before the Bench of Honorary Magistrates of the Civil and Military Station of Bangalore makes this application to revise and set aside an order acquitting the accused of a charge under s. 504 of the Indian Penal Code.

No doubt the language complained of is vulgar and obscene, but whether it would constitute an offence under the Penal Code is a matter that must be decided by a court with reference to the class of society to which the parties belong. In this case the Magistrates were in the best position to say whether the words complained of would constitute an offence among persons of the class to which the parties belong.

As they have acquitted the accused after due consideration of this point and also of the character of the complainant and the nature of the relations existing between the parties, I decline to interfere and reject this application.

Application rejected.

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Before Colonel P. D. Henderson, C.S.I., Resident.

1893 *June* 21.

In re AHMED HUSSAIN AND TWO OTHERS (ACCUSED).*

Code of Criminal Procedure (Act X of 1882) ss. 144 and 435—Nuisance—Revisional powers of High Court.

An order by a magistrate forbidding a nuisance under s. 144 of the Code of Criminal Procedure is excluded from revision by the High Court under s. 435 (last para.) of the same Code.

Mr. *Lubeck* for the petitioners.

The Order of the Resident (*Colonel* P. D. HENDERSON) was as follows :—

The Magistrate's order was passed under s. 144 of the Code of Criminal Procedure. It is not contended that the Magistrate acted without jurisdiction. This being a case under the last clause of s. 435 of the Code of Criminal Procedure the High Court is precluded from exercising its powers of revision in respect to the order. The application is therefore rejected.

Application rejected.

Before Colonel P. D. Henderson, C.S.I., Resident.

In re COOPAMA (COMPLAINANT).†

1893 *July* 14.

Indian Penal Code (Act XLV of 1860 s. 420—Cheating—Appreciation of evidence—Revisional powers of High Court.

Where the case is one of appreciation of evidence and it cannot be said that the conclusion of the Magistrate on the facts is unreasonable and unwarranted by the evidence on record or the circumstances of the case, the High Court will not as a court of revision interfere.

Mr. *Evers* for the petitioner.

* Criminal Revision Petition No. 1 of 1893 against the order of Mr. Abdul Rahiman, Second Magistrate, Civil and Military Station of Bangalore, in Criminal Case No. 50 of 1893.

† Criminal Revision Petition No. 2 of 1893 against the order of Mr. Abdul Rahiman, Second Magistrate, Civil and Military Station of Bangalore, in Criminal Case No. 65 of 1893, dated the 15th day of May 1893.

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In re COOPAMA.

The Order of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

This is an application to revise the proceedings of the Second Magistrate acquitting the accused of a charge of cheating under s. 420 of the Indian Penal Code.

It appears that the consideration for the mortgage was paid in the presence of the registering officer who endorsed the fact on the document. If so, the Magistrate was right in holding that the offence of cheating in respect of the mortgage deed could not be said to have been committed. If subsequent to registration of the document the accused prevailed on the complainant by means of false pretences to part with the notes, that would amount to cheating in respect of these notes. If, on the other hand, she of her own accord gave these notes to the accused for safe custody and with a view to his making payments for her from time to time as circumstances required, he would be guilty of criminal breach of trust. But the accused denies having taken back the notes from the complainant and the Magistrate does not seem to believe the complainant's story. It is a matter of appreciation of evidence and it cannot be said that the conclusion of the Magistrate on the facts is unreasonable and unwarranted by the evidence on record or the circumstances of the case.

This court as a court of revision must therefore decline to interfere with the judgment of acquittal passed by the Second Magistrate; and this application is rejected.

Application rejected.

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Before Colonel P. D. Henderson, C.S.I., Resident.

1893

August 14.

In re A. R. PILLIAR MOODELLIAR (ACCUSED).*

Summary trial—Code of Criminal Procedure (Act X of 1882), ss. 263 and 355—Record of evidence—Revisional powers of High Court.

In a summary trial where no appeal lies, a Magistrate need not make a record of the evidence of the witnesses. Section 355 of the Code of Criminal Procedure (Act X of 1882) must be read with s. 263.

Also, whether a finding is opposed to the weight of evidence and the probabilities of the case is a point which the court would not ordinarily go into on revision and would especially be unable to decide in a summary case, where no record of evidence exists.

The Order of the Resident (*Colonel* P. D. HENDERSON) was as follows:—

This is an application for revision of a summary conviction under s. 504 of the Indian Penal Code, on which the accused was sentenced to pay a fine of Rs. 7—12—0 or in default to suffer rigorous imprisonment for ten days.

The principal grounds urged in the application are, (1) that the magistrate failed to make a memorandum of the substance of the evidence of the witnesses for the prosecution as directed by s. 355 of the Code of Criminal Procedure, (2) that he declined to examine the defence witnesses and (3) that the finding is opposed to the weight of evidence and the probabilities of the case.

Section 355 of the Code of Criminal Procedure must be read with s. 263, which provides that in cases where no appeal lies the magistrate need not record the evidence of the witnesses. This was a

* Criminal Revision Petition No. 3 of 1893, against the order of Mr. Abdul Rahiman, Second Magistrate, Civil and Military Station of Bangalore, in Criminal Case No. 288 of 1893.

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In re PILLIAR MOODELLIAR

summary trial and there is no appeal from the sentence. There was therefore no necessity to record the evidence.

There is nothing to support the petitioner's allegation that the magistrate declined to examine his witnesses.

Whether the finding is opposed to the weight of evidence and the probabilities of the case is a point which this court would not ordinarily go into in revision and which this court is unable to decide in a summary trial like this where no record of the evidence exists.

Application rejected.

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COORG CASES.

APPELLATE CIVIL.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

B. VENKATARAMANIA (DEFENDANT) *v.* HASIM KHAN SAIB (PLAINTIFF).* 1893 *August* 19.

Limitation Act (XV of 1877), Sch. II, Arts. 57, 59 and 115—Second appeal on facts.

The plaintiff advanced Rs. 900 to the defendant as part purchase money of two coffee estates which the defendant failed to convey and sold to other parties. The plaintiff sued to recover his advance.

Held that Sch. II, Arts. 57 and 59 of the Limitation Act (XV of 1877) did not apply; but the case came under Art. 115 and was not barred as it was brought within three years from the time the contract was broken.

Also, there was no question of partnership. The suit was for refund of advances of purchase-money on the ground of breach of contract by failure to convey.

Further, the genuineness of exhibits was a question of fact as to which the High Court would not interfere unless satisfied that the lower courts had drawn strained conclusions from the evidence or from the circumstances of the case.

Mr. *L. Sreenivasaiengar* for the appellant.

The Judgment of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

The suit was to recover Rs. 900 being the sum advanced by the plaintiff to the defendant in three instalments under a contract to buy two of four coffee estates which the defendant had agreed to purchase from Messrs. Matheson and Co. The cause

* Appeal from appellate decree No. 5 of 1893 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in appeal No. 3 of 1893, dated the 29th day of March 1893, confirming the decree of Mr. K. Nanjapa, Munsiff of Mercara, in O. S. No. 29 of 1892, dated the 12th day of December 1892.

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of action was the defendant's failure to convey the two estates to the plaintiff pursuant to the agreement, the defendant having sold them to third parties.

The defendant admitted having received Rs. 428-11-8 only as advance from the plaintiff, and contended that the plaintiff, having broken the contract, was liable to pay Rs. 78-13-11 to himself on account of the losses incurred by him on account of the plaintiff's breach.

Both the lower courts have found that the sum advanced by the plaintiff was Rs. 900 and that it was the defendant who broke the contract. Accordingly they have given a decree in favor of the plaintiff.

The points urged in this second appeal are:—(1) that the suit is barred in respect of the items of Rs. 250 and 200 advanced in December 1888 and on the 8th January 1889 respectively; (2) that the suit in its present form is not maintainable; and (3) that the lower courts have erred in condemning *Ex. VII* and the defendant's account book as spurious.

The question of limitation was raised for the first time in the lower appellate court but was decided against the defendant and I think rightly. The suit was not for money payable for money lent or for money lent on an agreement that it should be paid on demand, in which cases Sch. II, Arts. 57 and 59 of the Limitation Act would have applied. The suit was to recover the sum advanced as compensation for a breach of contract. Limitation in such a case runs, not from the time the money is

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advanced, but from the time the contract is broken. Therefore Sch. II, Art. 115 applies. The breach in the present case could have occurred only after the 2nd February 1889 when the parties executed an agreement in favor of Messrs. Matheson and Co. for payment of the balance of purchase money. The suit having been instituted on the 12th January 1892, it was not barred.

The advocate for the appellant urged that the suit should have been for an account and for dissolution of partnership. But there was no partnership contract. The suit was for refund of an advance on the ground that the defendant had failed to convey two estates to the plaintiff according to the agreement. The suit in its present form is therefore maintainable.

The genuineness or otherwise of *Ex. VII* and of defendant's accounts was entirely a question of fact and I am not satisfied that the lower courts have drawn strained conclusions from the evidence on that point or from the circumstances of the case.

The appeal is therefore dismissed under s. 551 of the Code of Criminal Procedure.

Appeal dismissed.

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1893 October 28.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

BETUVALANDA CHENGAPA (DEFENDANT No. 1) *v.* KARIANA THIMA CHETTY AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 3).*

Genuineness of document a question of fact—Facts not entered into on second appeal—Stamp Act (I of 1879), s. 34 prov. 3—Want of stamp as ground of appeal—Consideration—Repudiation of sale—Questions for consideration in second appeal.

A decree having been given to the plaintiff by both lower courts on a promissory note against the maker and endorsees, the former preferred a second appeal on the grounds that the note was not genuine, that it was not duly stamped and that there had been a failure of consideration. *Held* that the question of genuineness of the document was one of fact which could not be entered into on second appeal. *Also,* that, a document having been once admitted in evidence as duly stamped, the question of its admissibility could not be made ground of second appeal. *Also,* that although there might have been a failure of consideration by reason of the appellant not having been put in possession of certain lands, for the purchase of which he had transferred the promissory note to the other defendants, and this question might be raised on second appeal for the first time; yet, as the appellant had not signified an intention to repudiate the sale, no relief could be given to him.

Mr. *C. Sabapathi Iya* for the appellant.

Mr. *L. Sreenivasaiengar* for respondent No. 1.

The Judgment of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

The plaintiff as the transferee of a promissory note *(Ex. A)*, dated the 13th September 1891, executed by defendant No. 1 in favor of defendants Nos. 2 and 3 for Rs. 1,187 brought this suit to recover Rs. 1,244-1-11, being principal and interest

* Appeal from appellate decree No. 4 of 1893 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in appeal No. 6 of 1893, dated the 31st day of March 1893, confirming the decree of Mr. M. Baliapa, Second Assistant Commissioner of Coorg in O. S. No. 32 of 1892, dated the 29th day of December 1892.

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due on the said note. Defendants Nos. 2 and 3 admitted the transfer, but defendant No. 1 denied the genuineness of the promissory note. Both the lower courts found the promissory note to be genuine and gave a decree against defendant No. 1 for the amount sued for with costs.

Defendant No. 1 has preferred this second appeal in which the principal points raised for consideration are :—(1) Whether the plaint promissory note (*Ex. A*) is genuine; (2) Whether it and the endorsement made thereon transferring it to the plaintiff have been duly stamped, and, if not, whether they are admissible in evidence; and (3) Whether the promissory note is void either wholly or partially for want of consideration.

On the first point both the lower courts have come to a concurrent decision, namely, that the plaint promissory note is a genuine document. It is a question of fact into which this court cannot enter in second appeal.

As regards the stamp affixed to *Ex. A*, the appellant's advocate argued that from its very appearance it seemed to be one removed from another document and affixed to the plaint promissory note. No doubt there is a suspicious appearance about it. But if the body of the promissory note is in the handwriting of defendant No. 1 as found by both the lower courts, it is quite possible that he resorted to the trick in order to impose upon defendants Nos. 2 and 3 and with a view to set up the present defence. Granting that the stamp in question was one that had been used before, the promissory note would not come within the category of a duly

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stamped document. But as the court of first instance has admitted it in evidence, its admissibility cannot under proviso 3 to s. 34 of the Stamp Act (I of 1879) be called in question at this stage. *Khoob Lall and another* v. *Jungle Singh*(1); *Punchanund Dass Chowdhry* v. *Taramoni Chowdrain*(2); *Ramasami Chetti* v. *Ramasami Chetti and another*(3). The same remark applies to the endorsement on *Ex. A*, whereby defendants Nos. 2 and 3 transferred the promissory note to the plaintiff.

With regard to the question of consideration, the lower courts have found that Rs. 667 in cash and a previous note of Rs. 520 constitute the consideration for the plaint note. It is argued that inasmuch as the note for Rs. 520 was given by defendant No. 1 in order to make up the purchase-money for certain lands which defendants Nos. 2 and 3 had sold to him but failed to put him in possession of for the reason that there were certain minors interested in the lands on whose behalf the District judge refused to sanction the sale, there was a failure of consideration and that therefore the plaintiff's claim should have been disallowed at least to the extent of Rs. 520. This point was not urged before the lower courts. However it could have been considered by this court if the appellant had signified his intention of repudiating the sale of the lands. As it is we do not know what course he proposes to to take—whether he insists on the sale being completed or wants to ignore it and to ask for refund of the money that was paid in cash and for cancella-

(1) I. L. R. 3 Cal., 787. (2) I. L. R. 12 Cal., 64.
(3) I. L. R. 5 Mad., 220.

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tion of the promissory notes. If he should take the latter course, he might get back the Rs. 520 included in the present suit.

The decrees of the lower courts are therefore confirmed and this appeal is dismissed with costs.

Appeal dismissed with costs.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

1893 *March* 23.

MANAVATI BOPANA (DEFENDANT) *v.* RAMA SHETTY PUTAPA SHETTY AND ANOTHER (PLAINTIFFS).

AND

RAMA SHETTY PUTAPA SHETTY AND ANOTHER (PLAINTIFFS) *v.* MANAVATI BOPANA (DEFENDANT).*

Limitation—Limitation Act (XV of 1877), Sch. II, Art. 132 and s. 19—Stipulation that upon default of payment of interest, both principal and interest should become payable on demand—Acknowledgment—Registration Act (III of 1877) s. 17—Interest—Mortgage-decree—Transfer of Property Act (IV of 1882) ss. 88 and 90—Costs—Code of Civil Procedure (Act XIV of 1882) ss. 206 and 219.

Where a bond contained a stipulation that on failure to pay interest upon the dates thereby made payable, both principal and interest should become at once due and payable on demand, *held* that such stipulation modified and controlled the previous agreement by which the principal was to be paid on a particular date; and although with reference to such date the suit was not barred by limitation; yet, as the period of limitation should be counted from the date of failure to pay interest which placed the arising of the cause of action beyond the term allowed by the Limitation Act, the suit was barred.

Held further, that certain receipts produced by the plaintiff related to the debt sued for and were sufficient acknowledgments to prevent limitation barring the claim under s. 19 of the Limitation Act. *Also*, that such receipts did not require registration under s. 17 of the Registration Act (III of 1877.

Further, whether interest can be claimed for the period after

* Appeals from original decrees Nos. 1 and 2 of 1893 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in O. S. No. 18 of 1892, dated the 3rd day of October 1892.

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the date on which the principal became repayable, is a question to be determined from the construction of the document; and although the wording may not show an express agreement to that effect, yet if it can be inferred that the principal was intended to carry interest *post diem*, such interest should be allowed.

The form of decree on a mortgage should follow the Transfer of Property Act (IV of 1882) s. 88; and under s. 219 of the Code of Civil Procedure every judgment should contain an order as to costs.

The form of decree and proper order for costs in the present case pointed out.

Mr. *Lawrance* for the defendant.

Mr. *L. Sreenivasaiengar* for the plaintiffs.

The Judicial Commissioner (*Colonel* P. D. HENDERSON) made the following order of remand :—

This was a suit on a registered hypothecation bond to recover the principal and interest due for two years, ten months and eleven days previous to date of suit, by the sale of the hypothecated property, and from the defendant, if that should prove insufficient. The defendant contended that the suit was barred by limitation.

The plaint bond is dated the 12th August 1879. According to the first stipulation in the bond, interest on the principal of Rs. 4,000 at the rate of 1½ per cent. per mensem was payable at the end of January 1880, 1881 and 1882, and the principal became due at the end of January 1882. The suit was filed on the 11th August 1892. The District judge held that the twelve years period allowed by Sch. II Art. 132 of the Limitation Act applied to the case and that the suit, having been brought within twelve years from the end of January 1882, was not barred. He accordingly gave a decree for the plaint amount charging the same on the hypothecated property.

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Both parties have appealed from the decree, the defendant contending among other things, that the suit is barred by limitation: and the plaintiffs urging that the lower court should have gone into the question of the sufficiency of the acknowledgments filed by them, and should have given a decree against the person and movables of the defendant as well.

The preliminary point for determination is whether the suit is barred by limitation. If the money sought to be charged on the hypothecated property became due at the end of 1882, as the District judge thinks it did, then the suit would not be barred, at least so far as it related to the principal sum secured by the mortgage, for there can be no doubt that Sch. II, Art. 132 of the Limitation Act governs the case. But the stipulation as to the time when the principal and interest are payable is followed by another stipulation which provides that in default of payment of interest at due date, both principal and interest became due at once on demand irrespective of the time allowed by the first stipulation. It is admitted that default was committed in respect of payment of interest on the several dates above mentioned. As the first stipulation is modified and controlled in its effect by the second, the plaintiffs' cause of action arose on the 1st February 1880 notwithstanding the words "on demand" which cannot legally postpone the starting point of limitation to a time when actual demand is made. The creditor here has not waived the benefit of the second stipulation but has slept over his rights and has simply allowed time to lapse. Limitation therefore runs from the first default.

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In the matter of Cheni Bash Shaha v. *Kadum Mundul*(1); *Nobodip Chunder Shaha* v. *Ram Krishna Roy Chowdhry*(2). As the suit was instituted more than twelve years after the 1st February 1880, it would be barred unless the period is extended by reason of acknowledgments of the debt under s. 19 of the Limitation Act.

Before discussing the other points raised in the two appeals it is necessary to decide on the sufficiency or otherwise of the acknowledgments relied on by the plaintiffs. This point has not been gone into by the District judge in his judgment, and it is contended by the defendant that there is nothing in the acknowledgments to show that they related to the plaint debt.

In these circumstances the following issues are framed and sent down to the lower court for trial:—(1) Do the acknowledgments contained in *Exs. B* to *R* or any of them relate to the plaint debt? (2) If so, are they sufficient under s. 19 of the Limitation Act (XV of 1877) to extend the period of limitation?

The District judge will take additional evidence, if necessary, and return his findings on the above issues together with the evidence so taken within three months from this date. The parties are allowed fifteen days' time to file their objections, if any, to the findings, from the date of receipt of the same in this court.

Case remanded for findings.

(1) I. L. R. 5 Cal., 97. (2) I. L. R. 14 Cal., 397.

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On return of the case by the District judge with his findings the following judgment was passed by the Judicial Commissioner (*Colonel* P. D. HENDERSON) :—

The facts of the case are given in this court's remand order of the 23rd March last. The findings returned by the District judge on the two issues sent down to him for trial are :—(1) that the acknowledgments *B* to *R* relate to the plaint debt; and (2) that they are sufficient to extend the period of limitation.

The objections taken by the defendant (appellant) to the District judge's findings are :—(1) that *Exs. B* to *R* are documents that require to be registered under s. 17 (*b*) of the Registration Act (III of 1877) and not being so registered they cannot be admitted in evidence; (2) that the acknowledgments contained in them are vague and not sufficiently specific to extend the period of limitation; and (3) that even if they do, they only revive the personal liability of the defendant.

In support of the contention that the documents *B* to *R* require to be registered, the advocate for the defendant (appellant) cited *Faki* v. *Khotu*(1) But that case is distinguishable from the present one, inasmuch as the judges there held that a document which purported to be only a receipt contained a declaration of title to immovable property and therefore came within the definition of documents requiring to be registered under s. 17 (*b*) of the Registration Act. That decision and several

(1) I. L. R. 4 Bom., 590.

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others were reviewed by the Allahabad Full Bench in *Jivan Ali Beg* v. *Basa Mal*(1) and the interpretation they put upon that section is that it refers only to such documents as in themselves purport or operate to create, declare, &c., a right title or interest of the value of Rs. 100 or upwards in immovable property, and this appears to be a correct view of the section. The acknowledgments in question do not in themselves create a right in or declare a title to property. The mortgage right was originally created by a separate document, *Ex. A*; and *Exs. B* to *R*, by reason of the acknowledgments contained in them that the debt is still subsisting, and by operation of s. 19 of the Limitation Act (XV of 1877) keep alive the right of recovering the debt according to the original liability.

"When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed:" and an acknowledgment is sufficient "though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right." Surely the Legislature could not have contemplated the registration of such an informal or imperfect document. No Registrar of Assurances would register a document of this description. Section 21 of the Registration Act lays down that a document relat-

(1) I. L. R. 9 All., 108.

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ing to immovable property ought not to be accepted for registration unless it contains a description of such property sufficient to identify the same. I therefore hold that the documents in question do not come within the scope of s. 17 (*b*) of the Registration Act and are admissible in evidence though not registered.

The next point for consideration is whether the acknowledgments refer to the plaint debt. I have no doubt that they do. Besides the plaint debt, the principal of which is Rs. 4,000, the defendant owed one of Rs. 2,500 of the same date to Kapni Shetty which still remains undischarged, and another of Rs. 500 on a promissory note for which a decree has been obtained. *Exs. B* and *C*, dated 1st April and 9th August 1883, respectively, refer not only to the decree debt but also to all monies due by the defendant to Kapni Shetty. *Ex. D*, dated 5th October 1883, refers expressly to amount due according to bond. In *Ex. E*, dated 23rd October 1883, reference is made to all monies due to him. In *Ex. G* which is dated the 12th January 1887 the defendant promised to settle the amount due on bond. *Ex. J*, dated 30th May 1888, cannot but include the plaint debt as the defendant alludes to Rs. 7,500 as the amount agreed to be paid towards liquidation of the debt due to Kapni Shetty. In *Ex. O*, dated 28th January 1889, both the bonds are referred to. I therefore hold that the acknowledgments contained in these documents are sufficient under s. 19 of the Limitation Act to keep alive the mortgagees' remedy both against the person of the defendant and against the hypothecated property.

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The remaining points arising for determination in the two appeals are (1) whether the plaintiffs are entitled to the whole or any portion of the interest awarded by the lower court; (2) whether they are also entitled to a decree against the defendant and his movables; (3) whether the decree of the lower court has been correctly drawn up; and (4) whether it is in conformity with the judgment.

In the plaint Rs. 2,750 were claimed as interest at 2 per cent. per mensem for the two years, ten months and eleven days preceding the institution of the suit, the plaintiff foregoing his claim to the interest that had accrued due prior to that period. It is urged for the defendant (appellant) that in the absence of an express contract to pay interest after the end of January 1882 the plaintiffs cannot, according to the decisions reported in *Bhagwant Singh* v. *Daryav Singh*(1) and *Gudri Koer* v. *Bhubaneswari Coomar Singh*(2) claim interest as such. Whether there was a contract express or implied to pay interest *post diem* is a matter that has to be gathered from the document *Ex. A*. This is rather obscurely and ambiguously worded and there does not appear to be an express stipulation to pay interest till repayment of the principal. Still it is sufficiently clear that the principal was intended to carry interest at two per cent. per mensem even subsequently to the date on which it became repayable. The District judge was therefore right in awarding the interest claimed by the plaintiffs.

By reason of the acknowledgments already considered, the remedy of the plaintiffs against the de-

(1) I. L. R. 11 All., 416. (2) I. L. R. 19 Cal., 19.

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fendant's person has been kept alive. If the defendant is personally liable, it follows that his movables also may be seized in satisfaction of the same.

The decree of the lower court is not correctly drawn up. The form which a decree in a suit of this nature ought to take is pointed out by s. 88 of the Transfer of Property Act. If the net proceeds of the sale which may take place pursuant to a decree drawn up in accordance with the provisions of that section be found to be insufficient to pay the amount due for the time being on the mortgage, the plaintiff will be entitled, under s. 90 of the same Act, to recover the balance from the defendant as the personal remedy is not barred.

Section 219 of the Code of Civil Procedure requires that the judgment shall direct by whom costs of each party are to be paid and s. 206 lays down that the decree must agree with the judgment. The District judge has made no order as to costs in his judgment but in the decree the defendant is saddled with the plaintiffs' costs. This was probably due to an oversight. However as both parties have appealed from the entire decree the matter may be set right in this court by the appeal decree. The defendant's conduct in inducing his creditor by entreaties to abstain from suing for a long time and in setting up the plea of limitation when the suit was brought is reprehensible though the plea is permitted by law and he ought to pay the plaintiffs' costs throughout and bear his own. The plaintiffs' appeal is allowed but that preferred by the defendant is disallowed with costs.

In modification of the lower court's decree it is

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therefore ordered that the defendant do pay to the plaintiffs within six months from this date, Rs. 6,750 with interest on Rs. 4,000 at six per cent. per annum from date of suit (11th August 1892) until payment and their costs in both the courts: that in default the hypothecated property or a sufficient part thereof be sold and the sale proceeds (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what may be found to be due under this court's decree, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same. If the net proceeds of the sale be found to be insufficient, the deficit should be made good by the defendant.

Decree modified.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

1893 *August* 12.

KRISHNIA AND OTHERS (DEFENDANTS) *v.* NARINA AND ANOTHER (PLAINTIFFS).*

Sale by one of joint owners—Refund on failure of consideration—Transfer of Property Act (IV of 1882) s. 55 (2)—Contract Act (IX of 1872) ss. 65 and 37—Survival of right of action on contract—Costs.

A sold certain property from which the purchasers were ejected by persons who claimed it as their family property. On suit to recover possession a decree was given to the purchasers for one-half only of the property, that being found to be *A's* share. After *A's* death a suit was brought to recover the half purchase-money from his estate, *Held,* that under s. 55 (2) of the Transfer of Property Act (IV of 1882) *A* must be deemed to have contracted that the interest which he professed to sell actually existed and that he had power to transfer the same; whence there was an implied contract under s. 65 of the Contract Act (IX of 1872) on his part to refund

* Appeal from original decree No. 3 of 1893 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in O. S. No. 21 of 1892, dated the 5th day of January 1893.

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to the purchasers the price of the half share in respect of which the sale was held to be invalid. Mayne's Hindu Law (*see* s. 341) also lays down that when sale of joint property by one co-parcener is set aside at the instance of the other co-parceners, the latter should refund to the buyer the purchase-money if it went to the joint fund or otherwise benefited the joint property.

Held further, that as rights and liabilities arising out of contract survive to and against the legal representatives of the contracting parties unless a contrary intention appears from the contract (Contract Act, s. 37), the obligation in the present case survived and the legal representatives of *A* were bound to discharge it to the extent of the assets inherited by them. On the facts of the case the decree of the lower court was modified as regarded some of the defendants and the order as to costs was reviewed, the latter being made payable by the parties in proportion to the amounts allowed and disallowed.

Mr. *L. Sreenivasaiengar* for the appellants.

Mr. *Lawrance* for the respondents.

The Judgment of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

The following are the facts of the case:—One Mahalingia, brother of Krishnia, defendant No. 1, sold to the plaintiffs certain movable and immovable properties for Rs. 4,000, and the plaintiffs were put in possession of the same but were subsequently ousted therefrom by Krishnia and his sons who claimed them as joint family property. In the suit which the plaintiffs brought to recover the property, the sale was held to be valid only to the extent of Mahalingia's one-half share in the properties. Mahalingia died during the progress of the suit leaving a will (*Ex. F.*) dated the 21st November 1890 which directed that out of the unexpended balance, viz., Rs. 2,230, of the sale proceeds which he had deposited with one T. Ramaswamy Pillay, Rs. 425 were to be applied in liquidation of certain specified debts of

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his and the remainder was to be spent on various purposes mentioned therein. Ramapia (defendant No. 4) was the executor of the will.

The present suit was brought by the plaintiffs to recover Rs. 4,108-2-4, of which Rs. 2,000 was claimed as value of a moiety of the properties in respect of which the sale was held to be invalid, Rs. 1,000 as damages in the shape of interest and the balance as the law expenses which they incurred in the former litigation, the whole to come out of Mahalingia's half share in certain movable and immovable properties and his other assets in the possession of defendants Nos. 1, 2 and 3, and the other assets which might come to the possession of defendant No. 4 as executor of the will. The action was based on the ground that the plaintiffs were induced by Mahalingia to believe that the properties he conveyed belonged to him exclusively.

Defendants Nos. 1, 2 and 3 contended among other things that the purchase was effected in collusion with defendant No. 4 and T. Ramaswamy Pillay in order to defraud them and with a full knowledge of their rights: that the plaintiffs' cause of action was personal and died with Mahalingia; that the properties in which he had a joint interest while alive having devolved on them as absolute owners by right of survivorship, cannot be liable to the plaintiffs' claim: that Mahalingia left no will, and that if he left any the same was invalid.

The defendant No. 4 pleaded that in the first instance defendants Nos. 1, 2 and 3 were liable to satisfy the plaintiffs' claim as they were in posses-

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sion of all properties in which Mahalingia had a joint interest.

The District judge found that defendants Nos. 1, 2 and 3 were not in possession of any separate assets of Mahalingia: that the plaintiffs were entitled to recover Rs. 2,000 out of the amount which is in deposit with Ramaswamy Pillay; and that as two debts aggregating Rs. 610-6-2 had been already paid out of the said deposit amount, the said defendants should contribute Rs. 447-10-11 to make up the deficiency. Accordingly the decree was that defendants Nos. 1 to 3 should pay the amount in Ramaswamy Pillay's hands as well as Rs. 447-10-11 to make up Rs. 2,000. They were also saddled with the plaintiffs' costs to the amount of Rs. 264-8-0.

This is an appeal by defendants Nos. 1, 2 and 3. The points raised for decision are:—(1) Whether the plaintiffs are entitled to claim refund of Rs. 2,000? (2) Whether the appellants are liable to make good to the plaintiffs Rs. 447-10-11? (3) Whether the lower court's decree directing them to pay an amount which is in the hands of a third party is correct? and (4) Whether the defendants are liable to the plaintiffs' costs of the suit?

With regard to the first point, I hold that the plaintiffs are entitled to recover Rs. 2,000 out of the amount held in deposit by Ramaswamy Pillay. It is contended for the defendants that in the absence of a covenant for title and of fraudulent representations by Mahalingia the plaintiffs' suit must fail. But under s. 55, sub-section (2) of the Transfer of Property Act (IV of 1882) Mahalingia must be deemed to have contracted that the interest which he

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professed to sell actually existed, and that he had power to transfer the same. As the sale was held to be valid only to the extent of his half share in the property, there was an implied contract on his part to refund to the plaintiffs the price of the other half in respect of which the sale was held to be invalid (*see* s. 65 of the Contract Act).

It was argued by the appellants' advocate that the maxim *actio personalis moritur cum personâ* applies to the case and that the plaintiffs' right of action died with Mahalingia and cannot be enforced against his legal representatives. But the rule is subject to several exceptions and does not apply to this case. The obligation was one that arose out of a contract and his legal representatives are bound to discharge it to the extent of the assets inherited by them. Rights and liabilities arising out of contracts survive to and against the legal representatives of the contracting parties unless a contrary intention appears from the contract (*see* s. 37 of the Contract Act). It has been held that when a sale of joint property by one co-parcener is set aside at the instance of the other co-parceners, the latter should refund to the buyer the purchase-money, if it went to the joint funds or otherwise benefited the joint property (*see* Mayne's Treatise on Hindu Law, s. 341, where the decisions on the subject are collected).

As regards the second point, the District judge seems to have held defendants Nos. 1 to 3 liable to pay Rs. 447-10-11 on the ground that a family debt of that amount was paid out of the money that was in deposit with Ramaswamy Pillay. It is one of the two debts the liquidation of which is provided for in Ma-

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halingia's Will, *Ex. F.* He treated it as his separate debt. Further, *Ex. III.* shows that Kelapanda Iyama, the person to whom it was due, sued defendant No. 4 and Ramaswamy Pillay only, without making Krishnia and his sons parties to the suit. It has not been shown that K. Iyama obtained the decree against the defendants Nos. 1, 2 and 3 for the debt, though the burden of proof lay upon the plaintiffs. It appears that the amount of this debt was paid into court by Ramaswamy Pillay without the intervention of these defendants. This being the case, it is not safe to infer from the contradictory statements of Krishnia that the debt was a family debt. Defendants Nos. 1 to 3 cannot therefore be held liable to contribute the above sum. Besides there seems to be no necessity to ask them to contribute as the money held by Ramaswamy Pillay carries, according to his own admission, interest at one per cent. per mensem and is therefore more than sufficient to meet the plaintiffs' claim.

With reference to the third point, the respondents' advocate admits that the decree is not happily worded and suggests that it was probably intended as an injunction against the defendants. It is admitted that the money has not come to the hands of the defendants and is still with Ramaswamy Pillay. If so, it does not seem reasonable or proper to direct them to recover the money from him and pay it to the plaintiffs. It is sufficient if decree be given against the amount in Ramaswamy Pillay's hands which can be recovered in execution. Defendants Nos. 1 to 3 cannot object to the same, they

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being parties to the suit and to the appeal. Nor can defendant No. 4 object to it, for he has not appealed from the lower court's decree, and in para. 6 of his written statement he has admitted that in case other assets are not available, the plaintiffs' claim may be satisfied out of the bequeathed assets of the late Mahalingia.

There remains the question of costs before the two courts. The District judge has ordered defendants Nos 1 to 3 to pay Rs. 264-8-0 to the plaintiffs for costs. The plaintiffs sought to recover Rs. 4,108-2-4 out of certain specified properties in the hands of these defendants. The District judge has found that they are not in possession of any property that is available as the separate assets of Mahalingia for the satisfaction of the plaintiffs' claim. If so, there is no reason why they should be called on to pay the plaintiffs' costs which it is but appropriate should be recovered from the amount remaining with Ramaswamy Pillay. As defendants Nos. 1 to 3 did not admit plaintiffs' right to proceed against the assets in Ramaswamy Pillay's hands, they cannot justly claim from the plaintiffs the whole costs incurred by them in the lower court but it is just that the plaintiffs should pay them their proportionate costs in the court below on the amount disallowed, viz., Rs. 2,108-2-4.

It is accordingly ordered in modification of the lower court's decree that the respondents do recover Rs. 2,000 and their costs Rs. 264-8-0 out of the amount deposited by the late Mahalingia with T. Ramaswamy Pillay, and that they do pay the appellants their proportionate costs in the lower court

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on the amount disallowed, *i. e.*, Rs. 2,108-2-4. As the appellants were obliged to appeal from the whole decree, their costs of the appeal should be paid by the respondents who should bear their own.

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Decree modified.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

1893 *August* 26.

MENAKSHAMA, A MINOR, BY HER NEXT FRIEND PATABHI RAMASHASTRY (PLAINTIFF) *v.* SUNDRESHIA AND ANOTHER (DEFENDANTS).*

Evidence Act (I of 1872) ss. 21, 31 and 115—Admission—Estoppel.

Admissions are not conclusive; and, though they may operate as estoppels, yet where there is no estoppel, any presumption arising from them may be rebutted.

Also, where one party has sworn to the fact of certain documents being in the handwriting of a particular person and the advocate of the opposite party in the lower court admitted their genuineness, *held* it was too late for that party to repudiate their genuineness in the appellate court.

On the evidence, *held* that there was sufficient to rebut the presumptions arising from admissions put forward by the appellant, whose appeal therefore failed.

Mr. *Travers-Drapes* for the appellant.

Mr. *L. Sreenivasaiengar* for respondent No. 1.

The Judgment of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

This was a suit to recover certain wet lands, coffee lands, a house and some movables which are alleged to have belonged to the plaintiff's late husband, Subba Rao, from his nephews.

The defendants' father, Ramia, and the plaintiff's husband, Subba Rao, were the sons of one Menakshia. The plaintiff's case is that in their father's

* Appeal from original decree No. 4 of 1893 against the decree of Mr. G. F. Meiklejohn, District Judge of Coorg, in O. S. No. 14 of 1891, dated the 15th day of July 1892.

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life-time about twenty years ago the two brothers divided their family-house and the movables and lived separately from that time; that whilst so living separately Subba Rao acquired wet lands and coffee gardens: that on his death the properties were managed by Ramia on behalf of the plaintiff, who is a minor, on the understanding that he was to make over to her the net proceeds of her husband's estates: that accordingly he did remit monies to her on that account until his death in March 1891, but that subsequently his sons, the present defendants, failed to render accounts and turned her out.

The contentions of the defendants are that Ramia and Subba Rao were undivided: that the suit properties are the common properties of the family and not the self-acquisitions of Subba Rao: and that the plaintiff is entitled only to maintenance.

The only issues tried in the case were (1) whether the brothers were divided or not, and (2) whether the properties in suit were the separate or self-acquired properties of the plaintiff's husband. On both these points the District judge found against the plaintiff and dismissed the suit.

This is a pauper appeal by the plaintiff. There is no evidence that there was a division of properties between the brothers in the life-time of their father, nor has any actual division at a subsequent period been proved by the plaintiff. The admissions contained in *Exs. P* and *Q* and the facts that the plaint-lands were purchased in the name of Subba Rao, that he was the registered proprietor of these and of the coffee estates, though a junior member, that he used to sue and be sued separately,

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are all relied on as fully supporting the plaintiff's case.

It was argued that Ramia having made an admission in *Ex. Q*, he and his representatives are estopped from alleging that a contrary state of things existed. Under s. 21 of the Evidence Act admissions are relevant and may be proved, not only against the person who makes them but also against his representatives in interest. But s. 31 lays down that admissions are not conclusive proof of the matters admitted though they may operate as estoppels. There was no estoppel in this case within the meaning of s. 115 of the said Act. It is therefore open to the defendants to show that the matters admitted are not true. We have now to consider whether there is evidence on the side of the respondents to rebut the presumptions which would otherwise arise in the above circumstances.

Ramia and Subba Rao being both Government servants were required to file in the Commissioner's office lists of properties held by them or in which they had an interest. *Ex. XC* consists of copies of two such statements filed by them. In both lists the same properties are entered and they include the lands and garden in suit. In the list filed by Ramia it is stated that he is a partner possessing full half-share in all the properties mentioned therein, while in the list filed by Subba Rao we find that the word 'proprietor' is entered against the Nallar land of 150 *batties* and that he claimed only half-share in all the other properties specified in his list. If all the plaint-land were Subba Rao's own and were acquired by him subsequent to a division,

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why should he have limited his interest in three of the plaint properties to only a half-share in them? The fact that he showed the Nallur land as his own in his list does not affect Ramia's interest, if any, in that land.

Exs. 35 to 38 are said to be abstracts of accounts from 1871 to 1887, in the handwriting of Subba Rao. It was argued that these are only scraps of paper and have not been proved to be in his handwriting. Not only has defendant No. 1 sworn to the fact, but the plaintiff's advocate before the lower court appears to have admitted the genuineness of the documents. It is therefore now too late for the plaintiff to repudiate their genuineness. In *Ex.* 36 the total income of the family from various sources and the expenditure under the various heads are shown. It would appear from this document, that the Nallur land was bought out of the family funds and that the up-keep of the plaint estates was also met from the same source. *Exs.* 37 and 38 show that the pay of the two brothers and the sale proceeds of coffee were clubbed together and treated as the income of a joint family.

From *Exs.* 50 to 58 it would seem that in the matter of purchasing new lands and leasing coffee crops and in the cultivation and management of the estates Subba Rao consulted with Ramia and abided by his directions.

Exs. 59, 67 and 69, the last of which is dated the 24th February 1889, show that Subba Rao was pressing Ramia to give him his share. All these facts are inconsistent with the hypothesis of a division having taken place between the brothers at any time.

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It must therefore be inferred that the admissions contained in *Exs. P* and *Q* are untrue and that they may have been made for a purpose as suggested by the respondents' advocate.

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The oral evidence also is in favor of the defendants' contention. I fully concur in the District judge's findings, and his decree is therefore confirmed and this appeal is dismissed.

The appellant and her next friend should pay to Government Rs. 345 on account of court-fees on the memorandum of appeal and should pay to respondent No. 1 his costs of this appeal.

Appeal dismissed.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

In re AKAMA AND ANOTHER (PETITIONERS).*

1893 *July* 14.

General Clauses Act (I of 1868) s. 2—British India—Coorg—Guardians and Wards Act (VIII of 1890) ss. 1 and 31.

Held, that Coorg is included in British India as defined by s. 2 of the General Clauses Act (I of 1868) and therefore the Guardians and Wards Act (VIII of 1890) extends to that province, there having been no exclusion of its operation under the Scheduled Districts Act (XIV of 1874).

An order by a District judge in Coorg under s. 31 of the Guardians and Wards Act (VIII of 1890) is therefore legal.

Mr. *Hayes* for the petitioners.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

This is an appeal from the order of the District Judge of Coorg refusing to grant permission to the

* Miscellaneous Appeal No. 1 of 1893 against the order of Mr. G. F. Meiklejohn, District Judge of Coorg, in Civil Miscellaneous No. 38 of 1892, dated the 13th day of February 1892.

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In re AKAMA.

appellants to mortgage the immoveable property of their wards.

The order appears to have been passed under s. 31 of the Guardians and Wards Act (VIII of 1890). The counsel for the appellants argues that this Act has not been extended to Coorg and that therefore the District Judge's proceedings are void *ab initio.* This ground not having been urged in the appeal petition, the advocate asks for permission to amend it. But it seems to me that the objection cannot stand. The Act extends to the whole of British India inclusive of Upper Burma and British Beluchistan. According to the General Clauses Act (I of 1868), s. 2 " British India" means the territories for the time being vested in Her Majesty by the statutes 21 and 22 Vic. cap. 106 (an Act for the better government of India) other than the settlements of Prince of Wales Island, Singapore and Malacca. Coorg is therefore part of British India and it has not been excluded from the operation of the Act by any Notification issued by the Local Government under s. 3 of the Scheduled District Act (XIV of 1874). This being the case, the Act must be taken to be in force in Coorg. The Bombay Minors Act (XX of 1864) which was in force in Coorg has been wholly repeated by the Guardians and Wards Act.

As for the merits of the case I have perused the papers on the record and find that the proposed mortgage is not only not to the benefit or advantage of the minors but is detrimental to their interests, and that no necessity has been made out for the same.

The appeal is therefore rejected.

Appeal dismissed.

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Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

1893
March 28.

MEENAKSHAMA, A MINOR, BY HER NEXT FRIEND PATABHI RAMASHASTRY (PLAINTIFF) *v.* SUNDRESHIA AND ANOTHER (DEFENDANTS).*

Limitation Act (XV of 1877) ss. 57 and 12—Application for leave to appeal as a pauper—Minor appellant.

An application for leave to appeal as a pauper does not come within s. 5 of the Limitation Act (XV of 1877) which applies only to appeals and applications for review. But where the pauper appellant is a minor, he is protected against limitation by s. 7 of the Limitation Act.

Mr. *Travers-Drapes* for the petitioner.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows :—

This is an application to admit under s. 5 of the Limitation Act an application to appeal as a pauper, which is out of time.

The reasons for the delay in filing the application to appeal as a pauper are set forth in the petition. Section 5 of the Limitation Act applies only to appeals and to applications for review of judgment, which terms are specific and cannot be interpreted as extending to applications for leave to appeal as a pauper. Applications of the latter kind are referred to in s. 12 of the Act as distinct from appeals, a circumstance which goes to show that the Legislature did not intend that the term appeal should include an application to appeal as a pauper. This is the view taken by the Madras High Court in *Lakshmi* v. *Ananta Shanbaga*(1)

But in the present case the appellant is a minor who is protected by s. 7 of the Limitation Act as

* Miscellaneous Petition No. 10 of 1892, praying that the delay in presenting the appeal may be excused.

(1) I. L. R. 2 Mad., 230.

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held by the Calcutta High Court in *Mon Mohun Bukshee* v. *Gunga Soondery Dabee*(1).

The application is therefore not barred by limitation.

Petition allowed.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

August 3.

SUNDRESHIA (RESPONDENT) *v.* MENAKSHAMA, A MINOR, BY HER NEXT FRIEND PATABHI RAMASHASTRY (APPELLANT).*

Code of Civil Procedure (Act XIV of 1882), s. 549—Appellant a minor and pauper—Security for costs of appeal.

Held that very special ground must be shown to support an application for security to be given by an appellant for costs. Mere poverty is no ground; and where the appellant is also a minor and the appeal had been admitted thereby showing reason for believing there are substantial grounds of appeal, there is no good cause for calling on the appellant to give security.

Mr. *Lawrance* for Mr. *Travers-Drapes* for the appellant.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

This is an application under s. 549 of the Code of Civil Procudure by the respondent in Regular Appeal No. 4 of 1893 to take security from the appellant therein for the costs of the appeal and of the original suit on the grounds:—(1) that the appellant is a minor possessing apparently no property and (2) that her next friend before the lower court abandoned the cause owing to his having been ordered to pay the court-fees on the plaint and has been superseded by another next friend before this court who is able to defray all expenses.

* Miscellaneous Petition No. 3 of 1893, praying that the appellant may be called upon to give security.

(1) I. L. R. 9 Cal., 181.

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SUNDRESHIA v. MENAKSHAMA.

It is contended by the advocate for the counter-petitioner that s. 549 of the Code of Civil Procedure does not apply to pauper appeals and he relies on the decision in *Nusseeroodeen Biswas* v. *Ujjul Biswas and others*(1) which was passed with reference to s. 342 of the old Code of Civil Procedure (Act VIII of 1859). The language of s. 549 of the present Code is general and applies to all appeals including appeals instituted in *formâ pauperis*. But mere poverty is no ground for requiring an appellant to give security for costs of an appeal. *Lakhmi Chand* v. *Gatto Bai*(2) and *Maneckji Limji Mancherji* v. *Goolbai*(3). Very special grounds must be shown to support an application of this sort, as has been held by the Madras High Court in *Seshayyangar and another* v. *Jainulvadin and another*(4). The appellant in the present case is not only a pauper but a minor as well. Moreover the pauper appeal has been admitted which is *primâ facie* ground for believing that there are substantial grounds for the appeal.

I see therefore no reason to grant the application which is accordingly rejected.

Application rejected.

(1) 17 W. R., 68. (2) I. L. R. 7 All., 543.
(3) I. L. R. 3 Bom., 241. (4) I. L. R. 3 Mad., 66.

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1893
March 16.

CIVIL REVISION.

Before Colonel P. D. Henderson, C.S.I., Judical Commissioner.

K. BELIAPA (PLAINTIFF) *v.* KORANA THAMO (DEFENDANT No. 1).*

Code of Civil Procedure (XIV of 1882) s. 206—Amendment of decree by lower court after appeal—Revision of amended decree—Date of amended decree.

Held, that a court has power under s. 206 of the Code of Civil Procedure (Act XIV of 1882) to amend its decree by bringing it into conformity with the judgment after it has been confirmed on appeal.

Also, the amended decree must bear the same date as the judgment.

Mr. *Hayes* for the petitioner.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows :—

In O. S. No. 2 of 1889 the petitioner sued for possession of two pieces of lands marked *J* and *K* in the survey plan *Ex. II.* The suit so far as it related to plot *J* was dismissed and the petitioner was allowed by the decree to be in possession of plot *K*, the boundaries of which were described in the decree as given in the plaint. Plot *J* is described in the plaint schedule as bounded on the west by Karekolly Mantij and the land in the possession of the plaintiff, and on the north by Malloni Bané in plaintiff's possession. Defendant No. 1 had traversed in his written statement the plaintiff's allegation that the disputed lands formed part of the plaintiff's Malloni Bané and contended that Malloni Bané was not in the locality in dispute.

* Civil Revision No. 1 of 1893 against the order of Mr. Brooke Leggatt, First Assistant Commissioner of Coorg, in Civil Miscellaneous Case No. 5 of 1892, dated the 10th day of October 1892.

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The Assistant Commissioner who tried the suit found that of the plots *X*, *Q* and *R* in the above mentioned plan, any of them might be the plaintiff's bané. It follows therefore that in the Assistant Commissioner's opiñion the plot marked *S* in the plan and forming the northern boundary of the two lands in dispute is not plaintiff's bané, though stated to be in his possession.

Defendant No. 1 appears to have objected to the specification of the boundaries in the decree as incorrect and misleading, and applied to the Assistant Commissioner to amend the decree and rectify the mistake. Accordingly the Assistant Commissioner ordered that the decree be amended so as to bring it into conformity with the judgment, and the decree was so amended as to make the boundaries tally with the survey plan by mentioning plot *S* as the northern boundary and *J* as the eastern boundary of plot *K*. This is an application to revise the amended decree.

Of course the plaintiff may be interested in having the northern boundary described as his Malloni Bané and defendant No. 1 may have the same object in objecting to it. But there can be no illegality or irregularity in defining the boundaries of the plot *K* according to the survey plan *Ex. II* when the boundaries given in the plaint are incorrect and misleading. The boundaries mentioned in the amended decree do not tend to support the allegations of one party or the other as to their rights, if any, in the adjoining lands and are perfectly consistent with the judgment.

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BELIAPA KORANA v. THIMMO.

Relying on the decision in *Mahomed Sulaiman Khan* v. *Mahomed Yar Khan*(1) and *Muhammad Sulaiman Khan* v. *Fatima*(2) the advocate for the petitioner contends that the Assistant Commissioner was not competent to amend his decree after it had been appealed from. But the Madras High Court have ruled in *Sundara* v. *Subbanna*(3) that a court has power under s. 206 of the Code of Civil Procedure to amend a decree by bringing it into conformity with the judgment after it has been confirmed on appeal, and this decision was followed by this court in *Kenchetty Dodanna* v. *S. D. Rama Rao*(4).

I therefore see no reason to interfere with the lower court's order or the amended decree except as regards the date of the latter which is given as 10th October 1892 while the judgment and the original decree are dated 8th September 1891. The amended decree also must bear the same date as the judgment. The correction will be made by the Assistant Commissioner's Court under ss. 205 and 206 of the Code of Civil Procedure.

Petition rejected.

(1) I. L. R. 11 All., 267. (2) I. L. R. 11 All., 314.
(3) I. L. R. 9 Mad., 354. (4) 15 M. L. R. 453.

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CRIMINAL REFERENCE.

1893.
March 16.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

In re NAYARA KARO (ACCUSED).*

Arms Act (XI of 1878) ss. 13 and 19(e)—Jurisdiction—Second-class Magistrate.

The offence of going armed with a gun without a license under s. 13 of the Arms Act (XI of 1878) is punishable under s. 19(e) of the same Act with imprisonment for a term which may extend to three years and therefore a Second-class Magistrate is not competent to try such offence.

The Order of the Judicial Commissioner (*Colonel* P, D. Henderson) was as follows :—

This is a reference from the District Magistrate of Coorg submitting for revision the proceedings of the Subedar Magistrate of Kigatnad Taluk in Criminal Case No. 15 of 1893 in which the accused was convicted of the offence of going armed with a gun without a license under s. 13 of the Arms Act (XI of 1878) and was sentenced to pay a fine of Rs. 4 or in default to undergo five days' simple imprisonment.

The offence being one punishable under s. 19 cl. *(e)* of the Arms Act with imprisonment for a term which may extend to three years, the Subordinate Magistrate who is only a Second-class Magistrate, is not competent to try such an offence under s. 29 of the Code of Criminal Procedure.

The conviction is therefore set aside as recommended by the District Magistrate, and the fine, if levied, is ordered to be refunded to the accused.

Conviction quashed.

* Criminal Revision No. 1 of 1893, on reference made by Mr. Brooke Leggatt, District Magistrate of Coorg, dated the 16th day of February 1893, in Criminal Case No. 15 of 1893 on the file of the Second-class Magistrate of Kigatnad Taluk.

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1893
November 17.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

In re YEDAGAI MYLARI (ACCUSED).*

Fraudulent breach of contract—Compromise—Effect of order of imprisonment.

Where a person charged with fraudulent breach of contract is directed to work out the contract but does not comply, the action of the court in regard to his imprisonment is not fettered by the wishes of the complainant.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

The District Magistrate of Coorg submits for revision the order of release passed by the Subedar Magistrate of Yelusavirashime Taluk in Criminal Miscellaneous Case No. 11 of 1893 on his file.

The accused, who had been charged with fraudulent breach of contract, was, by an order dated the 4th March 1893, directed to work out the contract. On complaint of non-compliance with the order his arrest was ordered, but he was finally released on the complainant stating that he had received from the accused the whole of the money advanced together with court costs.

When a complaint is made that an accused person who has been ordered by a court to fulfil a labor contract has failed to comply with the order, the court may award imprisonment after hearing any defence the accused may have to make, and its action is not fettered by the wishes of the complainant.

In the present case, however, I do not consider it

* Criminal Revision No. 4 of 1893, on reference made by Mr. Brooke Leggatt, District Magistrate of Coorg, dated the 25th day of September 1893, in Criminal Miscellaneous Case No. 11 of 1893 on the file of the Second-class Magistrate of Yelusavirashame Taluk.

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In re YEDAGAI MYLARI.

necessary in the interests of justice to order the Magistrate at this stage to enquire into the circumstances under which the accused neglected to obey the court's orders. Proceedings under the Act are of a *quasi* civil nature and the complainant at whose option the order for performance of the contract was passed was fully repaid the amount advanced by him with court costs. Further the complaint as to non-compliance with the court's order was made after the contract period had expired.

No Order.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

1893 *November* 17.

In re MOODKA AND ANOTHER (ACCUSED).*

Code of Criminal Procedure (Act X of 1882) s. 560—Vexatious complaint—Compensation.

Before making an order of compensation under s. 560 of the Code of Criminal Procedure (Act X of 1882), the complainant should be called on for any objection he may have to urge against such an order. *Also*, imprisonment can be awarded only where the compensation cannot be recovered.

An order which contravenes these provisions is illegal and irregular.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows :—

In Criminal Case No. 42 of 1893 on the file of the Parpatigar Magistrate of Yedavanad, the accused who had been charged by the complainant under ss. 341 and 504 of the Indian Penal Code were discharged, the Magistrate finding that a *primâ facie* case had not been made out against them, and the

* Criminal Revision No. 5 of 1893, on reference made by Mr. Brooke Leggatt, District Magistrate of Coorg, dated the 26th day of September 1893, in Criminal Case No. 42 of 1893 on the file of the Parpatigar Magistrate of Yedavanad.

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In re MOODKA.

complainant was ordered to pay the accused Rs. 15 as compensation on the ground that his complaint was vexatious and malicious. But the Magistrate does not seem to have asked the complainant whether he had any objection to urge against the making of the direction under the proviso (*a*) to sub-section (1) of s. 560 of the Code of Criminal Procedure, and the Magistrate was also wrong in passing a sentence of imprisonment in anticipation of the compensation awarded not being paid. It is only where the compensation of which payment has been ordered cannot be recovered that imprisonment can be awarded. Sub-section (2) of s. 560 is clear on this point.

I concur with the District Magistrate in the opinion that the Magistrate's order relating to the award of compensation is under the circumstances illegal and irregular. The complainant who had a right of appeal from the order may have been prejudiced by the Magistrate's non-compliance with the provisions of s. 560 (1) *proviso* (*a*). The order is therefore quashed and the amount of compensation, if recovered, is ordered to be refunded to the complainant.

Order for compensation quashed.

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CRIMINAL REVISION.

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

In re NANJUNDA SETTY (ACCUSED).*

1893.
July 5.

Code of Criminal Procedure (Act X of 1882) s. 517—Disposal of stolen property—Appeal—Order by Appellate Court—Restitution of property.

Where the Sessions Judge reversed a conviction for theft he ought at the same time to have set aside the Magistrate's order regarding disposal of the property under s. 517 of the Code of Criminal Procedure (Act X of 1882).

It is only when an offence appears to have been committed regarding any property or it has been used for commission of an offence that a court can pass an order for its disposal. And as in the opinion of the Sessions Judge no offence had been committed, it follows that the order of disposal could not stand.

The property however having been already delivered to the complainant, restitution could not be ordered by the criminal courts as the Code of Criminal Procedure contains no provision for restitution of property once made over to a party under s. 517.

Mr. *L. Sreenivasaiengar* for the petitioner.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows :—

This is an application under s. 439 of the Code of Criminal Procedure to set aside the order of the Sessions judge of Coorg in Cr. Mis. Petition No. 1 of 1893 and to direct restoration to the petitioner of certain jewelry which formed the subject of a criminal trial.

In criminal case No. 60 of 1892 on the file of the District Magistrate of Coorg, one Narasimmachary was convicted of theft and criminal breach of trust, in respect of certain articles of jewelry which he had pawned with the petitioner, and the District Magistrate ordered the jewelry to be made over to the complainant in the case. On appeal the Sessions

* Criminal Revision Petition No. 2 of 1893 against the order of the Sessions Judge of Coorg, in Criminal Miscellaneous Petition No. 1 of 1893.

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1893

In re NANJUNDA SETTY.

Judge quashed the conviction on the ground that no offence had been committed, but he omitted to modify the District Magistrate's order regarding disposal of the property, and when the petitioner applied for return of the jewelry the Sessions Judge rejected the petition, observing that he purposely refrained from interfering with the District Magistrate's order as regards the property with a view to the different claimants establishing their rights in a civil court.

It is only when an offence appears to have been committed regarding any property or when it has been used for the commission of an offence that a court can pass an order for its disposal under s. 517 of the Code of Criminal Procedure. Having convicted the accused, the District Magistrate was right in ordering that the jewelry should be made over to the complainant. But the Sessions Judge who quashed the conviction ought to have cancelled the District Magistrate's order: for if no offence had been committed in the opinion of the Sessions Judge as a court of appeal, it follows that the District Magistrate's order could not be allowed to stand. However the jewelry in question appears to have been already delivered to the complainant pursuant to the order of the District Magistrate and there is no provision in the Code of Criminal Procedure for restitution of property which has once been made over to a party under the above section of the Code. This court cannot therefore afford the petitioner the relief he asks. *In re Aunapurnabai*(1) and *Basudeb Surma Gossain* v. *Naziruddin*(2).

Application refused.

(1) I. L. R. 1 Bom., 630. (2 I. L. R. 14 Cal., 834.

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Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner. 1893 *August* 10.

In re MEKERI MADIA AND ANOTHER (ACCUSED).*

Mahazar—Partition-deed—Registration—Registration Act (III of 1877) ss. 17 and 49—Minority—Evidence—Theft—Attendant circumstances.

If a mahazar is of the nature of a partition-deed of immovable property its registration is compulsory and without registration it could not be received in evidence. *Further,* if the accused were a minor when it was executed it would not be binding on him.

Both the fact of partition and that such partition was effected when the accused was of full age appearing by abundant evidence on record independently of the mahazar, rendered its consideration immaterial.

The accused unjustifiably carried away the coffee under a mere assertion of right and the way they disposed of it showed they acted dishonestly with a view to get wrongful gain for themselves and cause wrongful loss to those lawfully entitled. Their act therefore amounted to theft.

Mr. *L. Sreenivasaiengar* for the petitioner.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

The District Magistrate of Coorg convicted the petitioners of theft of coffee under s. 379 of the Indian Penal Code and sentenced them to a fine of Rs. 350 each. On appeal the Sessions Judge confirmed the finding but reduced the fine to Rs. 100 each.

It was argued by the petitioners' advocate that the District Magistrate erred in admitting the mahazar (*Ex. A*) in evidence and that the partition effected by this document was invalid inasmuch as accused No. 2 was a minor at the time. If the mahazar was of the nature of a partition deed, its registration was compulsory under s. 17 of the Registration Act,

* Criminal Revision Petition No. 4 of 1893 against the order of Mr. Brooke Leggatt, District Magistrate of Coorg, in Criminal Case No. 11 of 1893, dated the 6th day of March 1893.

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1893 *In re* MEKERI MADIA.

and being an unregistered document, its admission in evidence was contrary to the provisions of s. 49 of the Act. Further if accused No. 2 was a minor when the partition was effected, it would not be binding on him. But the District Magistrate has found as a fact that accused No. 2 received his share after attaining majority: that from that time the father and the two sons worked and lived independently of each other, each cultivating his share of the property separately: that their dealings were separate and that after Atchia's death his widow continued to be in possession of his share and cultivated it. These findings it would seem are supported by abundant evidence on the record independently of the mahazar. Under these circumstances the accused were not justified in carrying away the crop under a mere assertion of right. The way in which they disposed of the coffee showed that they acted dishonestly with a view to get a wrongful gain for themselves and cause wrongful loss to the widow and her infant son, and their act would amount to theft.

I see, therefore, no reason to interfere and reject this application.

Application rejected.

Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner.

1893 October 13.

CHENANDA BELIAPA (COMPLAINANT) *v.* C. KARUMBIA AND OTHERS (ACCUSED).*

Mahazar—Partition-deed—Registration—Registration Act (III of 1877) ss. 17 and 49—Partition of family property among Coorgs—Yejman—Dishonest intention.

A mahazar of the nature of a partition-deed affecting immovable property requires registration under s. 17 of the Registra-

* Criminal Revision Petition No. 5 of 1893 against the order of Mr. G. F. Meiklejohn, Sessions Judge of Coorg, in Criminal Miscellaneous Appeal No. 6 of 1893.

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tion Act (III of 1877) and not being so registered cannot under s. 49 of the same Act be received in evidence: nor can secondary evidence of its contents or of the partition effected by it be received.

Partition of property among Coorgs is not enforced by the courts and cannot be effected privately except with the consent of all the members of the family. Two brothers could not therefore arrogate to themselves the power to divide property in which other brothers and nephews were interested without the consent of all and while the nephews were minors incapable of legally acting for themselves.

Held, therefore, that one of the brothers being the yejman of the family, even though he acquiesced for a time in the alleged partition, was at liberty to resume the management of all the family property and his removal of coffee under such circumstances could not be said to be dishonest within the meaning of the Indian Penal Code.

Mr. *L. Sreenivasaiengar* for the petitioner.

Mr. *Hayes* for the counter-petitioners.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

This is an application for revision of the District Magistrate's proceedings in Criminal Case No. 131 of 1892 in which the counter-petitioners and one Sakre Salapa, since dead, who had been accused of criminal trespass and theft of coffee, were discharged by the District Magistrate under s. 253 of the Code of Criminal Procedure.

The petitioner and counter-petitioners Nos. 1 and 2 are brothers. It is alleged that their movable and immovable properties, including some coffee gardens, were divided into four shares amongst them and the minor sons of their deceased brother Ganapathy under a mahazar in April 1891: that the petitioner has since been in possession of the properties allotted to his share: and that on the 26th November 1892 the counter-petitioners and some coolies removed by

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CHENANDA BELIAPA v. KARUMBIA.

force the coffee crop in some of the gardens allotted to him at the division.

The mahazar, which appears to have been of the nature of a partition deed, was a document which required to be registered under s. 17 of the Registration Act (III of 1877) and not being so registered cannot, under s. 49 of the same Act, be received as evidence of any transaction affecting the property comprised therein. The District Magistrate has therefore erred in admitting secondary evidence of the mahazar and of the division made under it.

He seems to have also erred in holding that unless and until the lease and the mortgage executed by counter-petitioner No. 1 in favor of the late Sakre Salapa, of both of which transactions the petitioner was aware, were set aside by a competent court, the petitioner had no cause of action in a criminal court. If the petitioner was, as alleged by him, in separate and exclusive possession of the gardens in question under a good title, the fact that counter-petitioner No. 1 executed a lease and a mortgage, does not affect petitioners' rights (if any) in, or possession of, the gardens.

The two important questions which the District Magistrate should have tried and decided are (1) whether the petitioner was at the time the alleged offences were committed, in lawful, separate and exclusive possession of the gardens? and (2) whether counter-petitioner No. 1 and his people entered upon the gardens and dishonestly removed the coffee crop? But these questions do not seem to have been gone into by the District Magistrate. There is some evidence to show that the

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petitioner paid a part of the assessment due on some coffee gardens and lands and that they were cultivated under his orders in the year in question but the evidence as to his separate and exclusive possession is neither satisfactory nor conclusive. Counter-petitioners No. 1 and 2 seem to have admitted, the former in a statement made before the District Magistrate on the 19th January 1892 and also in a petition presented to the same officer in Criminal Miscellaneous Case No. 1 of 1892, and the latter in a petition dated the 25th December 1891 addressed to the Commissioner of Coorg, that there had been a division made of the property: but it is clear from the record that counter-petitioner No. 2 did not sign the mahazar and did not consent to the division and that the sons of their deceased brother were minors.

Partition of property among Coorgs is not enforced by the courts and cannot be effected privately except with the consent of all the members. It is therefore difficult to conceive how under the joint family system prevailing in Coorg two of the brothers (the petitioner and counter-petitioner No. 1) could arrogate to themselves the power to divide the properties in which their other brother (counter-petitioner No. 2) and their nephews are also interested without the consent of the former and while the latter were minors legally incompetent to act for themselves. The alleged division seems, therefore, to be legally informal and invalid even though it may have been acquiesced in for a time by counter-petitioner No. 1. In these circumstances I presume that counter-petitioner No. 1, being admittedly the yejman of the family, is

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at liberty to resume the management of all the family properties. It cannot, therefore, be said that the removal of the coffee in question was dishonest in the sense in which that term is used in the Indian Penal Code.

I therefore decline to interfere with the order of discharge passed by the District Magistrate and reject this application.

Application rejected.

1893
Nov. 16.

Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner.

In re MUKATI MEDAYA (ACCUSED).*

Code of Civil Procedure (Act XIV of 1882) s. 643—Code of Criminal Procedure (X of 1882) s. 476—Preliminary inquiry—Sending accused in custody.

Section 643 of the Code of Civil Procedure (Act XIV of 1882) is closely similar to s. 476 of the Code of Criminal Procedure (Act X of 1882). It is only where necessary that a preliminary inquiry ought to be made under the latter section. *Held* that where two courts had come to the conclusion that documents were not genuine which the accused were charged with forging there seemed no necessity for such an inquiry.

Also, the fact that the accused were not sent in custody to the magistrate could not invalidate the order of the court ordering their trial.

Mr. *Lawrance* for the petitioner.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

In Civil appeal No. 39 of 1893 on his file the District Judge of Coorg expressed an opinion that *Exs. II*, *III* and *IV* filed by the appellant, Mukati Medaya, before the Virajendrapett Munsiff in the course of the trial of the suit out of which the appeal arose, were not genuine and he sent, under s. 643 of

* Criminal Revision Petition No. 8 of 1893, against the order of Mr. G. F. Meiklejohn, District Judge of Coorg, in A. S. No. 39 of 1893, dated 22nd day of August 1893.

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In re MUKATI MEDAYA.

the Code of Civil Procedure, to the District Magistrate for investigation a charge under ss. 193, 196, 471 and 474 of the Indian Penal Code against the said Mukati Medaya and under ss. 193 and 463 of the same Code against three of his witnesses.

This is an application to revise the District Judge's order regarding the prosecution of the petitioner.

The grounds of the application are (1) that the evidence on record is altogether insufficient to support the finding, (2) that the petitioner should have been given an opportunity of adducing oral evidence as to the delivery of the paddy and the cash payments which formed the consideration for *Ex. IV*, and also of examining Ramachendria, plaintiff's gumashta, respecting *Exs. II* and *III*, and (3) that the District Judge's finding is bad in law. Both the lower courts have found on the evidence that the documents in question are not genuine, and this court, in Second Appeal No. 13 of 1893* which the petitioner filed against the District Judge's decree, has declined to interfere with that finding.

Whether the plaintiff received Rs. 720 in paddy and in cash towards the plaint-bond is part of the second issue in the case. If the petitioner did not adduce evidence on that point, he has himself to blame and no other. Having failed to adduce such evidence he cannot now take advantage of his own omission when his prosecution has been ordered.

As regards the examination of Ramachendria, it was open to the petitioner to have asked the Munsiff to examine that person. If the Munsiff had without sufficient reason, refused to examine the man, the

* *See* Appendix.

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petitioner could have asked the District Judge on appeal to do so, which he has not done.

With regard to the third ground urged in the petition, the petitioner's advocate cited *Khepu Nath Sikdar* v. *Grish Chunder Mukerji*(1) where the Calcutta High Court held that before a magistrate can proceed under s. 476 of the Code of Criminal Procedure, he must, either in the case before him or on the enquiry which he must make, have distinct evidence of the commission of an offence. In the present case the District Judge's order was made under s. 643 of the Code of Civil Procedure which only requires sufficient grounds for acting under that section. That section is closely similar to s. 476 of the Code of Criminal Procedure. It is only where necessary that a preliminary inquiry ought to be made under the latter section. Such an inquiry was probably unnecessary in the present case as the two courts came to the conclusion that the documents were not genuine. Their concurrent findings, I presume, are sufficient to dispense with a preliminary inquiry and to require a magistrate to investigate the charge.

It was also urged at the hearing that the order contained in para. 15 of the District Judge's judgment is not a distinct order. But what he meant is clear from that paragraph. The fact that the petitioner or the other persons whose prosecution was ordered were not sent in custody to the Magistrate cannot invalidate the order. They were not in attendance before the District Judge at the time he passed the order.

Application rejected.

(1) I. L. R. 16 Cal., 730.

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Before Colonel P. D. Henderson, C. S. I., Judicial Commissioner. 1893 *Nov.* 9.

In re BRAHMIN THIMAPIA (APPELLANT).*

Indian Penal Code (XLV of 1860) s. 211—False charge—Sanction to prosecute—Police Report—Code of Criminal Procedure (Act X of 1882) s. 195 (b).

Where the Police reported a case as unfounded after the complainant had declined to proceed with it on the ground that the accused were related to him, *held* that there was nothing illegal or irregular in granting sanction to a prosecution under s. 211 of the Indian Penal Code on such report. If the complainant had insisted on his witnesses being examined and on the case being proceeded with, the magistrate would have been bound to do so before granting sanction for a false prosecution before him, but this the complainant did not do.

Further, no sanction was necessary to a prosecution for having made a false charge before the Police as s. 195 (b) of the Code of Criminal Procedure only requires such sanction when the false charge has been made in or in relation to proceedings in any Court.

Mr. *L. Sreenivasaiengar* for the petitioner.

The Order of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows :—

The petitioner charged before the police five persons, one of whom was his own nephew, with theft of certain articles and money of the aggregate value of Rs. 1,181. The police after investigating the charge reported it to be unfounded. The Assistant Commissioner to whom the police report was submitted summoned the petitioner to appear before him, but the petitioner did not dispute the police report or ask to have his witnesses examined, but on the other hand declined to proceed with the case on the ground that the accused persons were related to him. Thereupon Ramiah, accused No. 1 applied for sanction to prosecute the petitioner under

* Criminal Miscellaneous Petition No. 9 of 1893 against the order of Mr. G. F. Meiklejohn, Sessions Judge of Coorg, in Criminal Miscellaneous Appeal No. 10 of 1893, dated the 10th day of August 1893.

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In re BRAHMIN THIMAPIA.

s. 211 of the Indian Penal Code. The Assistant Commissioner declined to grant the sanction but the Sessions Judge did grant it.

It is urged on behalf of the petitioner that as the magistrate did not proceed with the case but dismissed it at an incipient stage, the Sessions Judge was wrong in granting the sanction and in basing it on the evidence adduced before the police. If the petitioner had insisted on his witnesses being examined and on the case being proceeded with, the magistrate would have been bound to do so before granting sanction for false prosecution before him. But the petitioner declined to proceed with the case and there would have been nothing illegal or irregular if the magistrate had granted the sanction.

I may here remark that there was no necessity for sanction in this case, if the sanction was bought to prosecute the petitioner for bringing a false charge before the police, for under s. 195, sub-section (b) of the Code of Criminal Procedure sanction for prosecution of an offence under s. 211 of the Indian Penal Code is required only when such offence is committed in, or in relation to, any proceeding in any court. *Empress of India* v. *Baldeo*(1); *Ashrof Ali* v. *The Empress*(2); *The Empress* v. *Salik Roy*(3).

Application rejected.

(1) I. L. R. 3 All, 322. (2) I. L. R. 5 Cal., 281.
(3) I. L. R. 6 Cal., 582.

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APPENDIX.

No. I (*see* page 72).

Suit for partition—Share in family property—Valuation of suit—Jurisdiction—Form of plaint.

1893 *March* 20.

KHAJEE BADARUDEEN SAB (PLAINTIFF) *v.* OOSMAN SAB AND OTHERS (DEFENDANTS).*

Mr. *K. T. Narasimiengar* for the appellant.

Mr. *Subana* for respondent No. 4.

The Judgments of the Chief Court (THUMBOO CHETTY, C. J., RAMACHENDRA IYER and MEENACSHAYA, JJ.) were as follows :—

THUMBOO CHETTY, C. J.—The question for decision in this appeal is, whether the Munsiff had jurisdiction to try and determine this suit.

The properties in dispute between the parties are a garden No. 193, a field No. 185 and a house.

Plaintiff and defendants Nos. 1 and 2 are brothers. Defendant No. 3 is their mother.

Plaintiff alleged that, at a family division which took place some thirteen or fourteen years ago, the properties were divided in certain shares between plaintiff and defendants Nos. 1 and 2 and that ever since division they enjoyed their respective shares, that some time prior to suit, defendants Nos. 1 and 2 removed the boundary wall of plaintiff's share of the house in collusion with defendant No. 3 who set up her right to some of the properties, on the ground that they were given to her on account of her mahar. As both plaintiff and defendants Nos. 1 and 2 sold and mortgaged their shares to defendants Nos. 4 to 7, they have been joined as defendants. Plaintiff sues to recover his share in the properties mentioned in the schedule. It is not stated in the plaint, when the boundary wall was removed, when the alienations in favor of defendants Nos. 4 to 7 were made, what particular shares or portions of the properties sued for are actually in the possession of each defendant, and what shares or portions which were in plaintiff's possession were alienated by him by mortgage or sale. It is

* Miscellaneous Appeal No. 64 of 1892, against the order of Mr. Lakshmeenarayana Iya, Munsiff of Nelamangala in O. S. No. 102 of 1892, dated the 14th day of November 1892.

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simply stated in the plaint that the cause of action accrued in January 1891.

The plaintiff wants to be put in possession of his share, one-third of seven-eighths, which he values in the plaint at Rs. 70. He also claims Rs. 50 damages from the defendants for dispossessing him of his share of the properties and causing loss to him.

The most valuable property in dispute is the house, the entire value of which is given in the plaint as Rs. 150, and the plaintiff's one-third share put down at Rs. 50.

The Munsiff has dismissed the suit, on the ground that the value of the whole house was Rs. 1,000, which, together with the value of the garden and field, exceeded the pecuniary jurisdiction of the Munsiff.

The plaint has been very badly framed. But it is clear, from what is alleged in it, that what the plaintiff seeks to recover is his share which was allotted to him at the division and which was in his possession and enjoyment for some time, *i. e.*, till the boundary wall was removed. So far as the house is concerned, what the plaintiff can claim is the share which was actually in his possession subsequent to the division and which is said to have been encroached upon or taken possession of wrongfully. He specifies in the plaint schedule the particular portion of the house which fell to his share and seeks to recover that portion less defendant No. 3's one-eighth share therein. This cannot be regarded as a suit for partition of properties in the common enjoyment of the parties. It is a suit to recover a particular share which was in the plaintiff's enjoyment and which share he says he had lost or been deprived of, by the wrongful acts of the defendants. It is, therefore, unnecessary to take the value of the whole house into consideration. If the plaintiff was required to file a plan with his plaint and to indicate in it the particular portion which was allotted to him up to the line of the boundary wall said to have been removed, the suit would be for the recovery of that specific share, and, granting that the whole value of the house was Rs. 1,000, the plaintiff's one-third share would have been only Rs. 333-5-8 and less if defendant No. 3's one-eighth share was deducted. Adding to this the value of the garden and field, the whole value of the plaintiff's share of the property to recover which this suit is brought, would be within the Munsiff's jurisdiction. As I have said before, no fresh or general partition of all the properties, including the shares of defendants Nos. 1 to 3, is needed, as plaintiff admits in his plaint that there was a general partition thirteen

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or fourteen years ago, and he was in possession and enjoyment of a particular portion which he has since lost.

With regard to the field and garden, the cause of action is not explicitly stated. A sketch showing the dimensions of the field and the particular portions that were allotted to him at the division should be filed, to enable the Munsiff to decide what portions are actually claimed.

The Munsiff ought to have scrutinized the plaint properly before he admitted it and required the plaintiff to state all the particulars noted above and also to indicate clearly in a sketch the particular portions of the house and lands he claimed to be put in possession of. The plaintiff should also have been required to state when the alienations in favor of defendants Nos. 4 to 7 took place and in respect of what properties, and when he himself alienated his shares and in whose favor.

As the value of the properties sued for, including damages claimed, does not exceed the Munsiff's jurisdiction, I would set aside the order dismissing the suit for want of jurisdiction. Bnt before the case is proceeded with, I would require the Munsiff to amend the plaint, having regard to the observations made above and resubmit the same within a given time. The costs of this appeal will be costs in the suit and abide the result of the fresh deeision of the Munsiff.

MEENACSHAYA, J.—In concurring with the judgment of the learned Chief Judge, I wish to add that there is a difference between a partition suit amongst Hindus of family property and a suit by a Mahomedan for his share of inheritance. The questions which arise for consideration in the disposal of the former, do not arise when the law gives definite shares to the heirs of a deceased Mahomedan.

RAMACHENDRA IYER, J.—This was a suit brought by a Mussulman against his mother and brothers for recovery of his share of the property left by his father. The Munsiff of Nelamangala returned the plaint, as he was of opinion that he had no jurisdiction to entertain it, inasmuch as the value of the whole property was above Rs. 1,000, The plaintiff has appealed from the decree.

I have discussed the question in my judgment in *Venkataramana Shetti* v. *Bheri Shamana*(1) and for the reasons given therein, I hold that the Munsiff had jurisdiction and that the order ought to be reversed.

The Munsiff, who returned the plaint, directed the plaintiff "to

(1) 16 M. L. R., 70.

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supply the deficient court-fee stamp within one month from this date," *i. e.*, the date on which the plaint was ordered to be returned. This was an unintelligible order, and it is needless to add that he had no power to collect additional stamp fee when he returned the plaint to plaintiff.

I should have stopped here, having disposed of the only question which was argued before the Full Bench. I feel, however, compelled to make a few observations in vindication of the Munsiff, whom the learned Chief Judge has censured for not scrutinizing the plaint, and who has been directed to order the plaintiff to amend his plaint so as to fully describe the land sued for. The plaintiff alleged that some years ago there was a division among the three brothers and that their mother consented to the division. No separate share was given to her; the three sons divided the property among themselves and each was in peaceful possession of his share. Recently quarrels arose and the mother was induced to set up her claim. The plaintiff allows that she has a right and that she is entitled to a eighth share. The present suit is for a general partition among the four sharers, *viz.*, a mother and three sons. The demand for judgment is not for the recovery of lands and houses which were allotted to the plaintiff at the first division, but "for a declaration of the plaintiff's title to a third of seven-eighths share in the whole properties described in the plaint schedule after deducting one-eighth share of defendant No. 3 in those properties." As this was a suit for general partition and as all the family property was set out in the schedules, I see no reason to censure the Munsiff on the score of lack of scrutiny of the plaint.

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No. II (see page 349).

Before Colonel P. D. Henderson, C.S.I., Judicial Commissioner.

MUKATI MEDAYA (DEFENDANT) *v.* KUPANDRA POOVANA (PLAINTIFF).*

1893 *November* 16.

Production of evidence—Opportunity—Issue—Onus of proof.

Mr. *Lawrance* for the appellant.

The Judgment of the Judicial Commissioner (*Colonel* P. D. HENDERSON) was as follows:—

The suit was for the recovery of Rs. 294 that remained due on a bond. The defendant while admitting execution of the bond pleaded that he had paid Rs. 720 in paddy and in cash, in proof of which he produced a receipt purporting to have been passed by the plaintiff and contended that the bond had been executed in consideration of a debt which had been falsely represented to be due by his late father. The Munsiff found that the receipt produced by the defendant was a forgery, that the alleged payment of Rs. 720 was false and that the bond was supported by good consideration. He accordingly gave a decree for the plaintiff which was confirmed by the District Judge on appeal.

In this second appeal which has been preferred by the defendant the only points that were urged at the hearing are:—(1) That he was not given an opportunity of adducing oral evidence as to the delivery of the paddy and the cash payment, or of examining Ramachendria, plaintiff's gumasta, and (2) That the plaintiff should have been put to the proof that the defendant's father did owe the money for which the bond was executed.

It would appear from para. 10 of the District Judge's judgment that the second issue framed in the case is as follows:—"Is the receipt dated 20th March 1892 purporting to have been executed by the plaintiff for Rs. 720 a genuine one? Has the plaintiff received Rs. 720 in paddy and in cash towards discharge of the plaint karar?" With a distinct issue like this on the record it is idle to say that the defendant was not afforded an opportunity of adducing oral evidence on the point. The omission to adduce such evidence was due to the defendant himself.

* Appeal from appellate decree No. 13 of 1893 against decree of Mr. G. F. Meiklejohn, District Judge of Coorg, No. 39 of 1893, dated the 22nd day of August 1893, confirming decree No. 234 of 1893, of the Munsiff of Virajendrapet, dated 28th day of June 1893.

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As regards the examination of Ramachendria, if the defendant thought that his evidence was material, it was open to him to have asked the Munsiff to examine that person. There is nothing to show that he did ask either the Munsiff or the District Judge to take any additional evidence.

The defendant having admitted execution of the bond and having paid the previous instalments due thereunder, the burden of proving that it was void for want of consideration clearly devolved upon him.

The other grounds mentioned in the memo. of second appeal not having been urged at the hearing, must be deemed to have been abandoned.

I see no reason to entertain this second appeal which is therefore rejected under s. 551 of the Code of Civil Procedure, and the lower court's decree is confirmed.

Appeal dismissed.

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ADJOURNMENT—*Absence of complainant—Dismissal of complaint—Compensation—Inference.*] In a case of assault both complainant and accused were absent on the day fixed for trial. The Magistrate acquitted the accused and ordered the complainant to pay them compensation. *Held*, that the order was wrong as there was no evidence to prove that the complaint was false and frivolous. The absence of the complainant did not warrant such an inference. The absence of all parties would rather indicate a compromise.—GOVERNMENT *v.* CHICKA KEMPA 268

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ARMS ACT (XI OF 1878) ss. 13 AND 19(*e*)—*Jurisdiction—Second-class Magistrate.*] The offence of going armed with a gun without a license under s. 13 of the Arms Act (XI of 1878) is punishable under s. 19(*e*) of the same Act with imprisonment for a term which may extend to three years and therefore a Second-class Magistrate is not competent to try such offence.—*In re* NAYARA KARO 337

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Offg. J., RAMACHENDRA IYER, J. *dissenting*)—That the first sale under the small cause court decrees was valid and passed the property to the purchaser thereat who was therefore entitled to possession from the purchasers at the second sale, at the date of which the judgment-debtor had no existing interest whatever in the property. No formal order of transfer of the decree from the regular to the small cause side of the sub-judge's court was necessary under s. 20 Act XI of 1865. *Per* MEENACSHAYA, Offg., J.—We have to consider whether or not the sale of the 4th April 1889 is valid; if valid, there can be no doubt that in July 1881 when the second sale took place the judgment-debtor had no existing interest whatever in the property. Section 285 of the Code of Civil Procedure has no bearing whatever on the present case and it is needless to consider whether the sub-judge's court is superior or not to the munsiff's court. The section simply points out that when claims are preferred and objections raised, the court which is empowered to determine them shall be the court of highest grade. * * * The only effect of the attachment before judgment is to prohibit private alienations. The legal effect of the sale is to annul the previous attachment before judgment; and the judgment-debtor's interest in the property having been sold in April 1889 nothing remained of it for sale in July 1891. * * * The subordinate judge has general jurisdiction which is co-ordinate or concurrent with that of the munsiff and for the purposes of Act XI of 1865, s. 20, there was nothing illegal in his order of attachment and sale of the debtor's immovable property. *Per* THUMBOO CHETTY, C.J.—The sub-judge had jurisdiction to attach the immovable property and to bring it to sale in execution of the decree passed on the small cause side of his own court and the mere omission to make a a formal transfer of the decree from the small cause to the regular side of this court under the provisions of s. 20 of Act XI of 1865 did not render his proceedings invalid. Such transfer is only necessary when the court which passed the decree is purely a court of small causes and has no general jurisdiction to execute the decree both against movable and immovable property * * *. The mere omission to record a formal order of transfer of the decree from the small cause to the regular side of the sub-court does not at all affect the jurisdiction. * * * The prior attachment before judgment was, under the provisions of s. 489 of the Code of Civil Procedure, no bar to the small cause decree-holder applying for attachment and sale of the property in execution of his decree. The defendants preferred no claim and raised no objection to the attachment and sale of the property under the decree; no question therefore arose for consideration under ss. 285 and 295 of the Code of Civil Procedure. *Per* RAMACHENDRA IYER, J.—If a sub-judge transfers to the regular side a decree made by him as a small cause judge (and I think that under s. 20 he ought not to transfer it), he exercises a power which a munsiff can exercise. In other words, the two courts are courts of concurrent jurisdiction and there is no reason for holding that one court is superior to the other. That being so, the argument that a sale ordered by a superior court ought to prevail, rests on no solid foundation. I am of opinion that a person who is bound to apply to a munsiff to execute his decree or to put it more favorably to the plaintiff, who *may* apply to a munsiff to execute his decree, ought not to be permitted to choose a superior court to gain an advantage to himself and to cause loss to a third person. I am of opinion that the plaintiff has not made out a title so as to dispossess the defendants. I would dismiss this appeal with costs.—BOPAUNA *v*, MUNI NARASAPA 90

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ATTESTATION: *see* DOCUMENT 185

AWARD—*Grant of relief greater than sought for by plaintiff—Separate suit*] Where the plaintiff's cause of action had merged in an award, the validity of such award should not be gone into in a suit on the original cause of action which formed only a portion of the subject-matter of such award. To do so would give the plaintiff greater relief than was sought by the suit. The general legal operation of the award should be left for a separate suit and only that portion of it dealt with that related to the claim advanced in the suit under appeal.—HAZARAM BEE AND OTHERS *v.* KOOLSUM BEE AND OTHERS ... 291

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CERTIFICATE OF ADMINISTRATION.—*Act for collection of debts on succession* (*XXVII of 1860*)—*Code of Civil Procedure* (*Act XIV of 1882*) *s. 366, Explanation—Right of certificate-holder to continue suit.*] The adopted son of a deceased plaintiff had obtained a certificate to collect debts due to the deceased under Act XXVII of 1860 and claimed to be allowed to continue the suit which was for recovery of a debt. *Held* that he should be allowed to continue the suit (*per* THUMBOO CHETTY, C. J.) as adopted son of the deceased; (*per* KRISHNA MURTI, J.) as holder of the certificate of administration. THUMBOO CHETTY, C. J.—A certificate of heirship does not of itself constitute the holder legal representative of the deceased; yet as it is not denied that he is the adopted son of the deceased he is as such entitled to ask the court to substitute his name for that of his adoptive father. KRISHNA MURTI, J.—The object of the Explanation to s. 366 of the Code of Civil Procedure seems to be to indicate the exact scope and extent of the operation of a certificate granted under Act XXVII of 1860. The holder is not entitled to recover any property other than debts on the strength of it or to enforce a right to succeed to the movable or immovable property of the deceased. The holder of the certificate has the right to represent the deceased and collect the debts due to the estate and to that extent he is doubtless the legal representative of the deceased to continue this suit, which is for the recovery of a debt. *Quære,* whether the certificate of heirship referred to in s. 366 (Explanation) of the Code of Civil Procedure has any existence at all in Mysore.—CHIK MALLIA *v.* GOVINDA AND OTHERS 169

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CODE OF CIVIL PROCEDURE (ACT X OF 1882) ss. 257A AND 258—*Contract Act (IX of 1872) ss. 62 and 63—Satisfaction of decree not certified—Enforcement by suit of bond taken for decree.*] Where a decree-holder took from his creditor a bond for the amount of his decree it was *held* that such bond was not void by reason of satisfaction of the decree not being certified to the court nor was there any bar to its being sued upon, under ss. 257A and 258 of the Code of Civil Procedure.—HANUMANTHA ROW *v.* MUNISAMI... 186

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) CHAP. XXXVII—*Reference to arbitration—Vagueness of reference—Acquiescence—Finding as to costs—Power of court to appoint new arbitrator—Irregularities—Misconduct.*] In a partnership suit, it was referred by the court at the request of the parties under Chapter XXXVII of the Code of Civil Procedure to five arbitrators, one of whom was called also "umpire", to take accounts and decide on the respective liabilities of the parties. Objection was taken to the award on the grounds that (1) the reference was illegal and void on account of the vagueness of its terms, (2) the decision as to costs was beyond the scope of the reference, (3) the court had no power to appoint an arbitrator in place of one (the so-called umpire) who had retired and (4) the arbitrators were guilty of misconduct (*a*) in not thoroughly examining the accounts (*b*) in not all meeting together to discuss the award and (*c*) in not all signing the award together. It was *held* that (1) although the demand for judgment covered a wide ground, the parties narrowed their differences on the reference to an examination of accounts by the arbitrators and a finding as to the respective liabilities of the partners and the court the parties and the arbitrator understood the reference as such and acted accordingly. Even if there was anything objectionable in this part of the case, the defendants stood by and acquiesced in the arbitration by submitting to its enquiries and to the examination of accounts by the arbitrators; (2) even granting that the recommendation about the costs of suits was not within the scope of the reference, the objection would be a ground for modifying the award under s. 518 of the Code of Civil Procedure and not for vitiating it *ab initio*. It is not an irregularity which goes to the root of the question and does not prejudice either party materially; (3) the sub-judge

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was quite within his powers when he decided to continue the arbitration and to appoint a successor of the umpire; and, (4) the acts alleged against the arbitrators were not such irregularities as would vitiate the award.—MAHOMED HUSSAIN AND ANOTHER *v.* ALARIKA GOOLAM HUSSAIN SAIT 199

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) CHAP. XX—*Insolvency—Receiver—Mortgagee committing waste—Separate suit for compensation—Procedure.*] In an insolvency under Chap. XX of the Code of Civil Procedure, one of the creditors, a usufructuary mortgagee who was in possession under a previous decree against the insolvent, felled trees on the mortgaged lands, and thereby diminished the value of the property. An order was made by the judge in insolvency, on a petition of the insolvent, that the amount of damage should be deducted from the amount due on the decree and the balance only be declared as the creditor's claim against the estate. On appeal it was *held* by the Chief Court that, assuming the mortgagee had injured the estate, the question of compensation ought not to be determined by a separate suit. *Linganna* v. *Guru Siddapah* (15 M. L. R., 9) followed. *Also*, the judge had power to determine the question in the exercise of his insolvency jurisdiction, but the application should have been made by the Receiver in his own name. As however in the present case a *bonâ fide* mistake was made by the insolvent and the judge, and the Receiver was practically a party to the proceedings inasmuch as he stated in the lower court he had no objection to the enquiry, the irregularity of the procedure sanctioned by the court could not vitiate the order appealed against.—CHICKA LINGA GOWDA *v.* SIDDARAJA URSOO 215

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) s. 244—*Division of lands in execution of decree—Procedure.*] Where, in execution of a decree for possession of certain lands, it was objected by the defendant that the plaintiff had been put in possession of lands other than he was entitled to under the decree and to a share of some of which the defendant was entitled, it was *held* that such questions should be decided. under the provisions of s. 244 of the Code of Civil Procedure, by order of the court in execution and not by separate suit. *Further*, as it appeared there had been no proper division of the lands in accordance with the decree, the case was remanded for a fresh decision after the property had been surveyed and lists and plan prepared. The proper course to be adopted in such a case was indicated by the orders of the Chief Court.—KASIPATHIA *v.* VENKATACHARY ... 219

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882), ss. 34 AND 559.—*Parties—Addition, of respondents.*] Defendants who are interested in an appeal may be added as respondents under s. 559 of the Code of Civil Procedure (Act XIV of 1882) although they may not have appealed from the original decree.—*In re* SOOB ROW 293

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882), s. 549—*Appellant a minor and pauper—Security for costs of appeal.*] *Held* that very special ground must be shown to support an application for security to be given by an appellant for costs. Mere poverty is no ground; and where the appellant is also a minor and the appeal had been admitted, thereby showing reason for believing there are substantial grounds of appeal, there is no good cause for calling on the appellant to give security.—SUNDRESHIA *v.* MENAKSHAMA 332

CODE OF CIVIL PROCEDURE (XIV OF 1882) s. 206—*Amendment of decree by lower court after appeal—Revision of amended decree—Date of amended*

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decree.] *Held*, that a court has power under s. 206 of the Code of Civil Procedure (Act XIV of 1882) to amend its decree by bringing it into conformity with the judgment after it has been confirmed on appeal. *Also*, the amended decree must bear the same date as the judgment.—K. BELIAPA *v.* KORANA THAMO 334

CODE OF CIVIL PROCEDURE (ACT XIV OF 1882) s. 643—*Code of Criminal Procedure (X of 1882) s. 476—Preliminary inquiry—Sending accused in custody.*] Section 643 of the Code of Civil Procedure (Act XIV of 1882) is closely similar to s. 476 of the Code of Criminal Procedure (Act X of 1882). It is only where necessary that a preliminary inquiry ought to be made under the latter section. *Held* that where two courts had come to the conclusion that documents were not genuine which the accused were charged with forging there seemed no necessity for such an inquiry. *Also*, the fact that the accused were not sent in custody to the magistrate could not invalidate the order of the court ordering their trial.—*In re* MUKATI MEDAYA 348

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) s. 345: *see* PENAL CODE ... 253

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CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) s. 476: *see* CODE OF CIVIL PROCEDURE 348

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) s. 195(*b*): *see* INDIAN PENAL CODE 351

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882), ss. 226, 227 and 536—*Sessions Trial—Additional charge framed after examination of prosecution witnesses—Prejudice to accused—Grievous hurt—Indian Penal Code (Act XLV of 1860), s. 320(8)—Mis-direction—Charge triable by assessors tried by jury.*] Where, after examination of the prosecution witnesses, the sessions judge added to charges of offences punishable under ss. 292 and 394 of the Indian Penal Code, a charge under s. 325, *held* that, as the additional charge was equivalent to the second one with omission of the aggravation relating to robbery, the accused had sufficient notice of all the circumstances constituting the offence. He was also given the opportunity of re-calling and examining the witnesses already examined, but did not choose to do so. He was therefore in no way prejudiced by the procedure adopted by the sessions court. In his charge to the jury the sessions judge told them that, because the medical officer gave as his opinion that the wounds caused to the complainant would have required three weeks to heal, the hurt was grievous hurt. *Held* that this was misdirection and there being no proof that the complainant had actually suffered bodily pain for twenty days, the accused could be convicted of only simple hurt. Although this offence was one triable by assessors and not by a jury, s. 536 of the Criminal Procedure Code provided that the trial should not on that ground only be invalid. The conviction was therefore altered to one for simple hurt and the sentence reduced to one year's imprisonment.—KEMPA *v.* GOVERNMENT ... 230

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) s. 437—*Discharge by Magistrate—Further inquiry—Additional evidence—Revisional jurisdiction—Notice to accused.*] It is competent to a District Magistrate under s. 437

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of the Code of Criminal Procedure to direct further inquiry to be held where additional evidence is not forthcoming. It is proper that notice should be given to an accused person before making an order under s. 437 of the Code of Criminal Procedure; though such notice is not expressly required. THUMBOO CHETTY, C. J.—The grounds for further inquiry may be (1) misappreciation of evidence and incorrect finding (2) mistake of law (3) irregularity in procedure or (4) any other good and sufficient reason arising upon a consideration of the circumstances of each case * * * *. Sec. 437 of the Code of Criminal Procedure cannot be construed in a limited sense but according to the ordinary meaning of the language used which is wide enough to admit of the further inquiry being ordered even in a case in which no additional evidence is forthcoming, but in which the Magistrate who discharged the accused has, in the opinion of the District Magistrate, not rightly appreciated the credit due to the witnessess and has erred in his inferences and findings. *Government* v. *Rudra* (11 M. L. R., 338) and *Government* v. *Manjah* (11 M. L. R., 354) reconsidered.—THE GOVERNMENT v. VADEROO AND OTHERS 255

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882), s. 488—*Maintenance—Arrears—Reduction of allowance.*] On an application for recovery of arrears of maintenance by a woman in whose favour an order under s. 488 of the Code of Criminal Procedure (Act X of 1882) had been made by a competent court, *Held* that the court had no power to reduce the allowance retrospectively nor, without any application by the husband and a proper trial, to reverse or otherwise interfere with the order prospectively.—GOVERNMENT *v.* DASAY GOWDA ... 264

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) ss. 144 AND 435—*Nuisance—Revisional powers of High Court.*] An order by a magistrate forbidding a nuisance under s. 144 of the Code of Criminal Procedure is excluded from revision by the High Court under s. 435 (last para.) of the same Code.—*In re* AHMED HUSSAIN AND TWO OTHERS... ... 299

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) s. 560—*Vexatious complaint—Compensation.*] Before making an order of compensation under s. 560 of the Code of Criminal Procedure (Act X of 1882), the complainant should be called on for any objection he may have to urge against such an order. *Also*, imprisonment can be awarded only where the compensation cannot be recovered. An order which contravenes these provisions is illegal and irregular.—*In re* MOODKA AND ANOTHER 339

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882) s. 517—*Disposal of stolen property—Appeal—Order by Appellate Court—Restitution of property.*] Where the Sessions Judge reversed a conviction for theft he ought at the same time to have set aside the Magistrate's order regarding disposal of the property under s. 517 of the Code of Criminal Procedure (Act X of 1882). It is only when an offence appears to have been committed regarding any property or it has been used for commission of an offence that a court can pass an order for its disposal. And as in the opinion of the Sessions Judge no offence had been committed, it followed that the order of disposal could not stand. The property however having been already delivered to the complainant, restitution could not be ordered by the criminal courts as the Code of Criminal Procedure contains no provision for restitution of property once made over to a party under s. 517.—*In re* NANJUNDA SETTY 341

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DECLARATORY DECREE—*Possession—Specific Relief Act (I of 1877) s. 42—Vague issues—Objection first taken specifically in the appellate court.*] Where the plaintiff sued for a declaration of their right to a certain village and it was proved that the defendants were in possession, *held*, that, possession being a relief which the plaintiff have to obtain in consequence of their right, the suit for declaration alone is not maintainable under s. 42 of the Specific Relief Act (I of 1877). An issue in such vague terms as "Is the suit, as brought, maintainable?" is objectionable; but in the present case, as it brought the question before the parties at the trial, it not did seem to be prejudicial to the plaintiffs to permit the objection under s. 42 of the Specific Relief Act to be taken in the appellate court.—JINKALA NARASIMAYA AND ANOTHER *v.* LINGAPA AND ANOTHER... 67

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DECREE—*Fraud—Execution—Cancelment of decree—Costs.*] The plaintiff had obtained a money decree and applied for its execution by attachment and sale of the defendant's property when he was met by the decree in a suit filed two and a half months after his decree, upon a bond hypothecating the defendant's property to another person. He thereupon filed a suit and obtained a decree declaring that the hypothecation bond was fraudulent, and the decree upon it collusive; directing both bond and decree to be cancelled and that he had a right to proceed in execution against the property. *Held*, that, on the facts the findings were correct that the hypothecation bond was not genuine and the decree upon it collusive and fraudulent, but that the lower court had no power to cancel the decree, without any motion by the parties to it to set it aside. The plaintiff who was a stranger had no right to pray for its cancellation. What he was entitled to was to pray for a declaration that the decree was inoperative against him and was no bar to the execution of the decree he had obtained. Costs allowed were remarked to be excessive. The batta of witnesses not examined was disallowed and the expenses granted only of those who were examined.—KALU BASANA *v.* CHICKA VEERANAPA 156

DECREE—*Construction—Interest.*] A decree was made payable by instalments, the first to be payable "immediately on the passing of the decree and the settlement of all claims against the estate." *Held* that this did not apply to all and every possible claim that might thereafter be advanced but only to certain specified claims well understood by the parties, which defendant No. 1 had undertaken to adjust with the creditors and obtain releases for from them. That from the date of these releases being brought in and accepted by the court, the decree-holder was entitled to interest as well as to payment of the first instalment.—COELHO *v.* SIDNEY SMITH 178

DEFAMATION—*Privilege—Excess—Penal Code (Act XLV of 1860) s. 499—Application to civil suits of principles of Penal Code regarding defamation—Measure of damages.*] Certain statements were made in a petition to an amildar reflecting on the character of a Hindu widow and complaining that she had been allowed within sacred places of a temple which was under the charge of the amildar. On a suit brought by her for damages for defamation it was *held* that the petitioners were inter-

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ested in preventing the desecration of the temple, and the amildar had a corresponding duty to enquire into the matter. The allegations in the petition were therefore privileged in so far as they did not go beyond the facts and what the petitioners honestly believed. But as there were other imputations which were made by the petitioners recklessly and without due enquiry, and were entirely unsupported by evidence the petitioners were liable to damages in respect of such imputations. Inasmuch however as the character of the petition and the circumstances under which it was written proved the intention to be not so much to defame the plaintiff as to prevent the desecration of the temple and the petitioners were not actuated by malice in fact while the plaintiff was by no means free from blame, nominal damages of Rs. 10 and no costs would suffice. *Held further*, that Chapter XXI of the Penal Code (Act XLV of 1860) codifies the law of defamation. It is the substantive law by which the criminal responsibility of a person is determined and there seems no reason why it should not be referred to for determining civil liability. It was so held by the High Court of Bombay in *Reg.* v. *Kikabhai Parbhudas* (9 Bom. H. C., 460), of Madras in *Parvathi* v. *Mannar* (I. L. R. 8 Mad., 175), and of Allahabad in *Abdul Hakim* v. *Tej Chandar Mukarji* (I. L. R. 3 All., 817); and following these rulings the question in the present case is, the language of the petition being undoubtedly defamatory, whether the defendants are protected by any of the exceptions to *s.* 499 of the Penal Code.—Srirungama *v.* Srinivasa Iyengar 45

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Document—*Attestation—Liability of attesting witness.*] The mere fact that a man attests a document does not prove that he consents to its contents or even is aware of them; nor is the act of attestation in itself any proof of acquiescence or ratification.—Konarapa *v.* Chickaveerapa 135

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Ejectment—*Notice—Mysore Land Revenue Code, s. 80—Permanent right of occupancy—Yearly tenancy—Wara tenure—Onus of proof.*] In a suit for ejectment and mesne profits, where the defendants set up a right

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of permanent occupancy, *Held* that the onus of proof lay on them. Although they failed to discharge it, and it was shewn they were only yearly tenants, yet they could not be ejected without proper notice and as the plaintiff had brought suit without such notice he could get a decree only for the rent due but not for possession of the land. On the evidence the tenure was held to be *wara*, that is to say, there was no payment of rent in kind or cash at a fixed rate. If in any year there was no crop or if the crop raised failed either wholly or partially owing to drought or other causes, the landlord had no right to complain or to claim payment of any rent; whereas if the land was taken up permanently at a fixed rate of rent in kind or cash, the tenure would be permanent and give the defendants a permanent right of occupation subject to payment annually of some fixed amount of rent. *Wara* is an uncertain share in the produce depending on the actual out-turn. * * * Where rent or *kundayem* has been paid at a certain rate for a considerable time, the principle affirmed in the decisions is that payment of rent in a particular form at a fixed rate is presumptive evidence that the parties have agreed that it was obligatory on one to pay and the other to receive rent in that form or at that rate so long as the relation of landlord and tenant may continue. *Venkoba Row* v. *Dharma Sing and another* (11 M. L. R., 123) approved.—SUBBAYA *v.* NARASEE 162

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EVIDENCE, DECREE ON ILLEGAL: *see* SMALL CAUSE SUIT 209

EVIDENCE—*Transfers of patta—Payment of kundayem—Village accounts.*] In a suit for the recovery of land the plaintiff relied on the fact that the land was first registered in the name of the plaintiff's father-in-law and then successively transferred to the names of her husband and herself as being inconsistent with the theory of the defence that the real pattadar was only a dependent of the defendants' family; the plaintiff also relied upon entries in certain village accounts as showing regular payment of kundayem by the plaintiff's family and that the family resided in a house separate from that of the defendants and managed its own affairs. *Held*, that these conclusions were not incorrect, but that the production of the village accounts did not dispense with the necessity of examining witnesses who made the entries if they were forthcoming. As corroborative evidence such entries are always entitled to great weight, but independently they might often be erroneous and lead to incorrect conclusions if the precaution of examining their authors be not adopted.—KADARAPA *v.* KADARAKA ... 140

EVIDENCE ACT (I OF 1872) ss. 25, 26, 27 and 118: *see* GUARDIANSHIP ... 222

EVIDENCE ACT (I OF 1872) ss. 33 and 43—*Admissibility of evidence taken in previous suit.*] In an original suit certain property was attached before judgment. A claim preferred to it was rejected and the un-

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successful claimant filed a regular suit. *Held* that, there being nothing before the court to shew that the proceedings in the original suit were admitted by the lower court or that the opposite party consented to their being admitted as evidence in the subsequent suit, the court could not look into such evidence in coming to a conclusion in the suit of the claimant. On the facts, *held further* that the lower court was right.—RABCA BEE *v.* HAJEE KADER MOHIDEEN... 287

EVIDENCE ACT (I OF 1872) ss. 21, 31 and 115—*Admission—Estoppel.*] Admissions are not conclusive; and, though they may operate as estoppels, yet where there is no estoppel, any presumption arising from them may be rebutted. *Also,* where one party has sworn to the fact of certain documents being in the handwriting of a particular person and the advocate of the opposite party in the lower court admitted their genuineness, *held* it was too late for that party to repudiate their genuineness in the appellate court. On the evidence, *held* that there was sufficient to rebut the presumptions arising from admissions put forward by the appellant, whose appeal therefore failed.—MENAKSHAMA *v.* SUNDRESHIA 325

EXCESS: *see* DEFAMATION 45

EXECUTION PURCHASER: *see* HINDU LAW 132

EXECUTION: *see* DECREE 156

EXECUTION SALE—*Confirmation—Certificate—Limitation Act (XV of 1877) Sch. II, Art. 178—Code of Civil Procedure (XIV of 1882) s. 316 and Sch. IV, Form 150—Title.*] *Held,* that the title of a purchaser at an execution sale vests from the date of the sale certificate, which is the date of confirmation of the sale. *Also,* as it is imperative on the courts to grant a certificate under s. 316 of the Code of Civil Procedure, the Limitation Act does not apply to an application for grant of a sale-certificate, which application may be made at any time. *Gangaram* v. *Rudranna* (14 M. L. R., 216 and 15 M. L. R. App., ii.) followed. A sale becomes absolute on confirmation, and a subsequent purchaser has no title as against the original purchaser merely because the latter holds no certificate or did not obtain one till after the second sale and more than three years after the sale to himself. Compare *Seshaya* v. *Komaria* (15 M. L. R., 233).—NAGANA SETTY *v.* SUBANA ... 1

F

FACTS NOT ENTERED INTO ON SECOND APPEAL: *see* GENUINENESS OF DOCUMENT A QUESTION OF FACT 306

FALSE CHARGE: *see* INDIAN PENAL CODE 351

FALSE CHARGE OF OFFENCE PUNISHABLE WITH SEVEN YEARS IMPRISONMENT: *see* JURISDICTION 269

FAMILY DEBT: *see* HINDU LAW 123

FELLING TREES: *see* FOREST RULES 266

FENCING: *see* RAILWAY ACT... 240

FINDING AS TO COSTS: *see* CODE OF CIVIL PROCEDURE 199

FOREST RULES, ss. 11 and 40—*Felling trees—License.*] No person is permitted to fell bamboos in a state forest without a license; and if a person fells more trees than his license permits him to do, his act is unauthorised and he is liable to punishment under ss. 11 and 40 of the Forest Rules.—GOVERNMENT *v.* BENGALURAPA 266

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FORM OF PLAINT: *see* SUIT FOR PARTITION ... ...App. i

FRAUD: *see* DECREE 156

FRAUDULENT BREACH OF CONTRACT—*Compromise—Effect of order of imprisonment.*] Where a person charged with fraudulent breach of contract is directed to work out the contract but does not comply, the action of the court in regard to his imprisonment is not fettered by the wishes of the complainant.—*In re* YEDAGAI MYLARI 338

FURTHER INQUIRY: *see* CODE OF CRIMINAL PROCEDURE 255

G

GENERAL CLAUSES ACT (I OF 1868) s. 2—*British India—Coorg—Guardians and Wards Act (VIII of 1890), ss. 1 and 31.*] *Held*, that Coorg is included in British India as defined by s. 2 of the General Clauses Act (I of 1868) and therefore the Guardians and Wards Act (VIII of 1890) extends to that province, there having been no exclusion of its operation under the Scheduled Districts Act (XIV of 1874). An order by a District judge in Coorg under s. 31 of the Guardians and Wards Act (VIII of 1890) is therefore legal.—*In re* AKAMA ... 239

GENUINENESS OF DOCUMENT A QUESTION OF FACT—*Facts not entered into on second appeal—Stamp Act (I of 1879), s. 34 prov. 3—Want of stamp as ground of appeal—Consideration—Repudiation of sale—Questions for consideration in second appeal.*] A decree having been given to the plaintiff by both lower courts on a promissory note against the maker and endorsees, the former preferred a second appeal on the grounds that the note was not genuine, that it was not duly stamped and that there had been a failure of consideration. *Held* that the question of genuineness of the document was one of fact which could not be entered into on second appeal. *Also*, that, a document having been once admitted in evidence as duly stamped, the question of its admissibility could not be made ground of second appeal. *Also*, that although there might have been a failure of consideration by reason of the appellant not having been put in possession of certain lands, for the purchase of which he had transferred the promissory note to the other defendants, and this question might be raised on second appeal for the first time; yet, as the appellant had not signified an intention to repudiate the sale, no relief could be given to him.—BETUVALANDA CHENGAPA *v.* KARIANA THIMA CHETTY 306

GRANT OF RELIEF GREATER THAN SOUGHT FOR BY PLAINTIFF: *see* AWARD ... 291

GRIEVOUS HURT: *see* CODE OF CRIMINAL PROCEDURE 230
INDIAN PENAL CODE 233

GUARDIAN—*Suit on behalf of minor.*] A suit was instituted on behalf of a minor by a person who was subsequently appointed guardian of the minor's person; but no order was made appointing any one guardian of his property. *Held*, that, as the proceedings in regard to the guardianship of the minor did not clothe any person with power to sue on his behalf, there existed no legal objection to the continuance of the suit by the guardian who had instituted it and was subsequently appointed guardian of the minor's person.—NANJAPA *v.* TAPA PAUPASANI 155

GUARDIANSHIP—*Illegitimate child—Indian Penal Code (Act XLV of 1860), s. 363—Evidence Act (I of 1872), ss. 25, 26, 27 and 118—Oaths Act (X of 1873), s. 5.*] The complainant had in the lifetime of the mother of an illegitimate female child constituted himself the girl's guardian, fed,

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clothed and brought her up after the death of her mother and regarded her as a member of his own family till she was kidnapped from his custody. *Held* that he was her lawful guardian within the meaning of s. 363 of the Indian Penal Code (Act XLV of 1860) and competent to prefer a complaint of kidnapping from his guardianship under that section. *Also*, that the provisions of the Evidence Act (I of 1872) s. 27 cannot be extended so as to allow a Police Officer to depose generally to confessions said to have been made to him by the accused. Such confessions fall under ss. 25 and 26 and cannot be used as evidence against the accused. *Also*, (*per* RAMACHENDRA IYER, J.)—If the magistrate was satisfied that the witness, by reason of tender years, was unable to understand the questions put to her or to give rational answers to them, she was not a competent witness and the magistrate ought not to have examined her at all. Evidence Act (I of 1872), s. 118. If she was a competent witness, she ought to have been examined upon oath or affirmation. Oaths Act (X of 1873), s. 5.—GOVERNMENT *v.* NARANAPA 222

GUARDIANS AND WARDS ACT (VIII OF 1890) ss. 1 and 31: *see* GENERAL CLAUSES ACT 329

GUTTA—*Limitation—Res judicata—Admission—Liability of son as legal representative of his mother.*] Land had been allotted by Government on favorable terms to the ancestors of the plaintiffs for the upkeep of certain temples; but as these terms were not adhered to, the favorable tenure was cancelled and the lands were fully assessed and registered in the names of the defunct temples. *Held*, that this change simply converted the *Inam* into *Kandayem*-paying land and did not affect the relative position of landlord and tenant previously subsisting between the plaintiffs and the defendants. *Also*, that the claim was not *res judicata*, because in the previous case relied on, the first plaintiff had no proper notice of the claim of defendant No. 2 nor was there any regular enquiry or adjudication upon their rights. *Further*, defendant No. 1 having admitted she was tenant of the plaintiffs but there being no privity of contract shown between them and her son, defendant No. 2, the latter was not liable in the present suit which was for *gutta* rent only. As however his mother died during the pendency of the suit, the decree should be against him as legal representative of his deceased mother to the extent of assets derived by him belonging to her estate.—PARVATHY BAYEE *v.* PUTAMA 59

H

HACKEYT CARRIAGES REGULATION, 1886—*Municipal rules—Registration and licensing of carriages.*] Carriages kept in places outside the *B* City Municipal limits, which bring passengers in from such places to *B* City, there unload and afterwards return to their own station are not kept for hire and used within the *B* City so as to require to be licensed by the Municipality of the said City under the Hackney Carriages Regulation, 1886, or the Rules thereunder; and a conviction of the owner of such a carriage for not taking out a license from the *B* City Municipality was illegal.—KASIM SAIB *v.* THE GOVERNMENT ... 252

HEIRS OF A MARRIED WOMAN—*Presumption as to nature of property left by a married woman—Mortgage by a person holding no title.*] In the absence of evidence as to the character of property left by a married woman, it should not be presumed to be of such a nature as to make

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her relatives on the paternal or maternal side her heirs and successors. If the acquisition was made with funds inherited from her husband, her relatives on the paternal or maternal side have no right whatever. If she acquired money by prostitution, the property might devolve upon her husband's heirs. *Held* therefore that a sister's daughter had no right, without proof that she had acquired a title by inheritance, to mortgage property left by a married woman; and the mortgagee had no right to take such property out of the possession of the foster-daughter of the deceased, to satisfy his debt.—THIMAPA *v.* LINGEE 55

HINDU LAW—*Reunion—Rights of reunited sons—Rights of divided son.*] A Hindu died, leaving sons by two wives *D* and *K*. He had divided from them all, but the sons of *K* claimed that there had been subsequently a reunion with them and therefore on his death they were entitled to his estate to the exclusion of the other sons. *Held, per* RAMACHENDRA IYER, J., following the Saraswati Vilasa, that reunited sons are entitled to share in their father's estate. "The proprietorship of reunited and unreunited sons in their father's wealth is properly equal." As a fact a reunion was proved. *Held, per* KRISHNA MURTI, J., on the evidence, that no reunion was proved. *Held per* CURIAM—That all the sons of the deceased should share his property equally.—HUCHA *v.* THIRUMALA GOWDA 27

HINDU LAW—*Inheritance—Sister—Sister's son.*—According to Hindu law, assuming that a sister is entitled to inherit as a *bandhu*, the claims of a sister's son are superior.—JANAKAMMA *v.* SOOBAMA ... 35

HINDU LAW—*Undivided family—Powers of manager—Limitation Act (XV of 1877), ss. 19 and 20—Acknowledgment of liability—Contract Act (IX of 1872), s. 25 (3)—Revival of debt.*] The managing member of an undivided Hindu family cannot revive a barred debt against other members of the family by a fresh promise such as is referred to in s. 25 (3) of the Contract Act (IX of 1872), but he has power to make payments for the family and the same authority to acknowledge as he has to create debts. If, therefore, he makes payment towards an unbarred debt under s. 20 of the Limitation Act (XV of 1877), the members of the family are bound; and also, *semble*, if he acknowledges a debt under s. 19 of the same Act.—BASALINGAPA *v.* GURUSANTHAPA 38

HINDU LAW—*Liability of family property on hypothecation made by father alone—Status of sons—Onus of proof.*] A Hindu father hypothecated the family property to secure money advanced to him as a loan for certain contract works on which he was engaged. The creditor sued him and his sons, who were minors, to enforce the hypothecation. *Held per* CURIAM (RAMACHENDRA IYER, J. and MEENACSHAYA, Offg. J.) following the earlier decisions of the High Courts, that the plaintiff must show the debt was contracted for such purpose as would bind the sons. *Held per* THUMBOO CHETTY, C. J., following the later decisions of the Privy Council, that the sons must make out a case for exempting their shares in the hypothecated property. *Held, on the facts,* by the FULL BENCH, that as it appeared the debt was contracted for such purposes as would bind the family and there was no proof that it was for an immoral or illegal purpose, the plaintiff was entitled to succeed and the appeal should be dismissed. *Per* THUMBOO CHETTY, C. J.—The plaintiff having proved that he had actually advanced the amount mentioned in the plaint-bond and that at or about the time the loan was contracted the father was actually engaged in contract works for

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which he was in need in money, the onus of proving that the debt was for an immoral or illegal purpose was on the sons. * * * I think the sons have not made out a case for exempting their shares in the hypothecated property and that the whole property is answerable for the plaintiff's debt. *Per* Ramachendra Iyer, J.—As a father and son have equal rights in the grandfather's property and as it is only in exceptional cases that a father is permitted to sell or mortgage ancestral property without the consent of the co-owners, the decisions of all the High Courts, till about fifteen years ago, were to the effect that a father had, as a rule, power to bind his own share of the family property and that if any one claimed the whole family property by virtue of a mortgage or a sale made by the father alone, he was bound to prove that the alienation was made for a necessary purpose. The doctrine that an alienation made by a father for a debt contracted by him is binding on a son if he does not prove that the debt was immoral, strikes at the root of the law of co-ownership. A father, who is declared to possess no better or larger right than a son, is practically made absolute owner of the ancestral property; and the right of disposition which the law says a father may exercise in exceptional cases becomes his normal right. By giving prominence to the doctrine of a son's pious obligation to discharge his father's debts, the Privy Council have over-ruled the decisions of all the High Courts, themselves admitting that their decision is "destructive of the principle of independent co-parcenary rights in the sons." * * * An hypothecation or a sale of family property is binding on sons and grandsons, not because it was made by a father or a grandfather but simply because the necessities of the family justified it and from the circumstances of the case it might be inferred that if the minors had been adults they would have consented to the alienation. In other words a father is only a manager of an undivided family and his power to dispose of his son's interest in the family property is not more extensive than his power to dispose of his nephew's interest. * * * The exposition of the law is laid down in West and Buhler's Digest of Hindu Law (pp. 601—651) and is substantially in accordance with the judgment of Justice Muttusami Aiyar in *Pounappa Pillai* v. *Pappuvayyangar* (I. L. R. 4 Mad., 15 to 40). These arguments do not seem to have been examined or refuted and as their Lordships of the Privy Council have plainly admitted that the tendency of their decision in *Nanomi Babuasin* v. *Modhun Mohun* (L. R. 13 I. A., 1; *S. C.* I. L. R. 13 Cal., 21) is to destroy the co-parcenary right of sons, which is incompatible with the limited power of disposition conferred upon a father by the Mitakshara, I think we may well follow the earlier decisions of all the High Courts and hold that if a sale or mortgage is made by a father alone and if the vendee sues for possession of the whole family property or if the mortgagee sues for money and prays for the sale of the whole family property, it is his duty to make the sons parties to the suit and to establish as against them, that the alienation was made for the sake of the family and that under the circumstances the father has power to dispose of the whole property. On the facts, the evidence being sufficient to prove that there was a *bonâ fide* loan and that the father acted as a prudent manager, the appeal must be dismissed. *Per* Meenacshaya, Offg. J.—When a mortgagee from a father alone seeks to enforce the mortgage upon the whole property by making both the father and the sons defendants in the suit, he is expected to show that the debt was contracted for such purposes as would bind the sons also, or, as Ramachendra Iyer, J. puts it, that the alienation was made for the sake of the family; and as I find from the record that the debt is proved to be

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of such a nature I concur in dismissing the appeal.—DASAPA *v.* NUNJUNDIA 103

HINDU LAW—*Joint family—Family debt—Liability of family property—Liability of sons for debt contracted by father alone*.] The father, who was manager of a joint Hindu family, was engaged in building contracts which he undertook for the benefit of the family. He had no other employment or means of earning a livelihood for himself and his sons. He borrowed money for the purposes of one of these building contracts and was sued for the debt together with his minor sons by the creditor, who sought to make the whole family property liable. The minors resisted the claim alleging that the father was of immoral and vicious habits and borrowed the money for purposes of immorality. *Held* (THUMBOO CHETTY, C. J., and MEENACSHAYA, Offg. J., RAMACHENDRA IYER, J. *dissenting*) that the debts must be regarded as contracted for the benefit of the family and binding on the sons: and their shares in the suit-property were consequently liable for the claim. A family necessity for the debt was proved and the debt was therefore binding on the sons. *Per* THUMBOO CHETTY, C. J.—As the present suit is by the creditor against both the father and sons to enforce his right not only against the father's share of the family property but also against the shares of the sons, there must be some *primâ facie* proof that the debts in question were contracted by the manager for such purposes as were binding on the sons also. * * * This is a case in which the father, as head of the family, took up a contract, by the profits of which the family was to be benefited and in which all the members would participate. The father had no employment and no means of earning anything for the support of himself and his sons except by taking up work on contract. That was a business undertaken for the benefit of the family and the father had therefore authority to hypothecate or mortgage the family property for the purpose of completing the contract. The debts must therefore be regarded as contracted for the benefit of the family and binding on the sons. Their shares in the suit-houses are consequently liable for the plaintiff's claim. * * * * A family necessity for the debt has been proved to exist in this case and the debt is therefore binding on the sons. * * * Whatever may be the character of the father it is proved that the money lent by the plaintiff was required and was apparently utilised for the contract taken up for the benefit of the family of the defendants. *Per* MEENACSHAYA, Offg. J.—I am satisfied that the debt was a *bonâ fide* one and contracted for the use of the family. In this view of the case it is unnecessary to discuss the question whether or not it is incumbent on the sons to prove, before they can succeed in exempting their shares, that the debt was contracted for immoral or illegal purposes just in the same manner in which they would be required to prove it if they were resisting an execution upon their shares on a decree obtained against their father alone. *Per* RAMACHENDRA IYER, J.—As the plaintiff failed to make out a case against the minors, I would, in modification of the munsiff's decree, direct the plaintiff to recover the money from the father's share only and exonerate the minor sons' shares from all liability. The plaintiff to pay the minors' costs throughout.—DASAPA *v.* NUNJUNDIA 123

HINDU LAW—*Joint family—Lability of family property—Execution purchaser—Lability of a member not party to the decree—Onus of proof.*] A purchaser from an auction purchaser at a sale held in execution of

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a decree against several members of a joint Hindu family sued for possession of the family property and was resisted by one member who was not party to the decree, those against whom it had passed being his distant cousins only, though one of them was alleged to have been manager of the family. *Held*, that although a manager or one member only of a Hindu family may under certain circumstances make a valid sale or mortgage of the joint family property without the concurrence of the other members, it lies upon the purchaser or mortgagee to establish the validity of the alienation. *Also*, a decree is not conclusive against nephews, brothers or cousins of the judgment-debtor, and a purchaser in execution must prove that the debt or alienation in question bound the other members who had not been made parties. A decree may be taken only as some evidence of the binding character of the debt.—DODA THAMA *v.* MANGIA OODOOPA ... 132

HINDU LAW—*Divided family—Adoption—Evidence.*] Defendants Nos. 1, 2 and 3 sold a shop and house to the plaintiff representing that it had fallen to the share of *N* on division with his brothers some fifty years previously and that defendant No. 1 was the adopted son of the said *N*. Defendant No. 2 was own brother to defendant No. 1, they being sons of *D* the brother of *N* by his first wife, while defendants Nos. 4, 5 and 6 were his sons by a second wife. Defendant No. 3 was son of defendant No. 2 and defendant No. 7 was lessee from defendant No 2 and alleged to have collusively let defendants No. 4, 5 and 6 into possession of the property in dispute. Besides the partition between *N*, *D* and other brothers fifty years ago, it was alleged that there had been also a division, thirty-eight years before suit, between *D* and his sons. These latter (defendants Nos. 4, 5, and 6) claimed to share in the property. *Held*, that the facts of defendant No. 1 being brought up by *N* and subsequently to his death by his divided brother *G* and that all *N's* property came to and was in the possession of defendant No. 1, supported the conclusion that defendant No. 1 was adopted by *N*. *Also*, the facts that the shop was mortgaged by *N*, was redeemed and subsequently mortgaged by the latter's divided brother *G*, who acted as guardian after the death of *N* to defendant No. 1, and that it was redeemed again by defendants Nos. 1 and 2 and let by them to defendant No. 7, were facts which went to show that the shop was not the property of the father of defendants Nos. 4, 5 and 6.—GURU BASAPA *v.* ADI MURTAPA 144

HINDU LAW—*Undivided family—Liability of heirs—Surety.*] The plaintiffs held contracts for the supply of the coffee-shop and canteen of the Field Battery at *B* and employed one *R C* as their agent in respect thereof. *R C* died and his accounts showing a considerable deficiency due by him to the plaintiffs, the latter sued his parents, widow and children to recover the same. *Held*, that the heirs of a Hindu are liable only to the extent of assets of the deceased in their hands and therefore the parents, widow and children of *R C* were not personally liable. *Further*, that as the plaint did not disclose that the father was regarded as surety of *R C* or was sued as such, he could not be held responsible in that capacity.—HYTHAN *v.* APPAVOO CHETTY 217

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ILLEGITIMATE CHILD: *see* GUARDIANSHIP 222

INDIAN PENAL CODE (ACT XLV OF 1860), S. 199: *see* AFFIDAVIT ... 295

INDIAN PENAL CODE (XLV OF 1860), S. 211—*False charge—Sanction to prosecute—Police report—Code of Criminal Procedure (Act X of 1882),*

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s. 195 (b).] Where the Police reported a case as unfounded after the complainant had declined to proceed with it on the ground that the accused were related to him, *held* that there was nothing illegal or irregular in granting sanction to a prosecution under s. 211 of the Indian Penal Code on such report. If the complainant had insisted on his witnesses being examined and on the case being proceeded with, the magistrate would have been bound to do so before granting sanction for a false prosecution before him, but this the complainant did not do. *Further,* no sanction was necessary to a prosecution for having made a false charge before the Police as s. 195 (b) of the Code of Criminal Procedure only requires such sanction when the false charge has been made in or in relation to proceedings in any Court.—*In re* BRAHMIN THIMAPIA 351

INDIAN PENAL CODE (ACT XLV OF 1860), ss. 302 and 326—*Murder—Grievous hurt.*] The accused was sentenced to death for murder and also, in the event of the sentence not being confirmed, to eight years rigorous imprisonment for causing grievous hurt to certain persons when a hue and cry was raised after him. *Held* that there was no connection between the murder and the grievous hurt and it could not be inferred from the accused committing the latter that he was guilty of the former, as to which there was no evidence on which he could be convicted. The conviction and sentence for murder were set aside, but those for grievous hurt were upheld as it had been proved that one of the persons injured was treated in hospital for more than twenty days, though there was no evidence as to the other persons to take their case beyond simple hurt punishable under s. 324 of the Indian Penal Code.—NANJUNDA *v.* GOVERNMENT 233

INDIAN PENAL CODE (ACT XLV OF 1860), s. 411—*Dishonestly retaining stolen property—Evidence.*] Where the accused had been convicted under s. 411 of the Indian Penal Code, because she had picked up some pieces of gold quartz near an abandoned shaft, but the only evidence for the prosecution was as to possession by her, *Held* that in the absence of evidence to prove that the quartz had been stolen or that the accused had any reason to believe that it had been stolen, the conviction was wrong and must be quashed.—THE GOVERNMENT *v.* KONGALA MOONI 238

INDIAN PENAL CODE (ACT XLV OF 1860), s. 504—*Insult—Construction of language complained of.*] Whether language complained of as insulting under s. 504 of the Indian Penal Code constitutes an offence under that section, is a matter that must be decided by a court with reference to the class of society to which the parties belong: and also after consideration of the character of the complainant and the relations existing between the parties.—*In re* MARIMOOTHOO 297

INDIAN PENAL CODE (ACT XLV OF 1860), s. 420—*Cheating—Appreciation of evidence—Revisional powers of High Court.*] Where the case is one of appreciation of evidence and it cannot be said that the conclusion of the magistrate on the facts is unreasonable and unwarranted by the evidence on record or the circumstances of the case, the High Court will not as a court of revision interfere.—*In re* COOPAMA 299

INFERENCE: *see* ADJOURNMENT 268

INHERITANCE: *see* HINDU LAW 35

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JODI—*Attachment of village for arrears due to Government—Right of some co-sharers alone to sue for rent—Definition of rent in Mysore Land Revenue Code, 1888—Mohtarfa—Limitation Act (XV of 1877), Sch. II Arts. 110, 120, 132.*] Where arrears of *jodi* were due to Government in respect of a certain village and under the Rules dated 15th November 1883 the village was attached and placed under Government management, some of the co-proprietors paid up the arrears due and obtained possession of the village with power to collect rent and taxes; *Held* that such co-proprietors could sue the tenants for arrears of rent without joining the other co-proprietors who had been neglectful of their interests and not joined in the payment to Government. *Held also* that *Mohtarfa,* being a payment made by a tenant to his landlord for the use of land for the purpose of erecting buildings on it in which he resides or carries on business, comes within the definition of "Rent" given in s. 3 (13) of the Mysore Land Revenue Code 1888, which is "whatsoever is paid or delivered in money or kind or whatever service is rendered by a tenant on account of the use or occupation of land let to him." *Mohtarfa* being thus rent simply and not a payment chargeable on the immovable property, a suit can only be brought to recover three years arrears, Art. 110 of Sch. II of the Limitation Act (XV of 1877) being applicable.—ABDUL RAHIMON SAIB *v.* VENKATA BHIMACHAR ... 52

JOINT DEBT—*Suit by joint-debtor against son of other debtor—Liability of son—Liability of assets of family.*] One of two joint-debtors being compelled by the creditor to pay the whole debt, brought a suit (alleging he was only a surety) to recover the whole amount from the son of his co-debtor stating that the debt had been contracted for the son's benefit. It appeared that the father was alive though the plaint made no mention of this fact; but the plaintiff did not care to sue him, as he had been declared an insolvent. *Held,* that, if the order in insolvency was no bar, the son, a minor, who was not a joint-debtor, did not make himself liable for the debt and could not be sued. *Further,* the father being alive the question of pious obligation did not arise. *Further,* if the debt was for the benefit of the son it was for family purposes; and as the family was not properly represented no decree could be passed against its assets.—RUNGA RAGHAVENDRA NARSIMACHAR *v.* TIRUMALA RUNGACHAR 64

JOINT FAMILY: see HINDU LAW 123
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JURISDICTION—*Partnership—Contract Act (IX of 1872), s. 265—Mysore Regulation VI of 1892—Retrospective effect of amending enactment.*] Retrospective effect cannot be given to an enactment such as Regulation VI of 1892 extending to Mysore the provision of Act IV of 1886 which omitted the proviso formerly appended to s. 265 of the Contract Act (IX of 1872). A suit to wind up the business of a partnership therefore, filed before the amending regulation came into force, is cognisable only by the District Court.—MYLARIA v. MAHOMED NIZAMOODIN SAIB 172

JURISDICTION—*Partnership—Suit for dissolution and winding-up.*] A suit, so framed as to claim only payment of a sum of money within the limit of the Sub-Judge's jurisdiction appeared on examination to be really one for dissolution and winding-up of a partnership. One of the items was beyond the jurisdiction of the Sub-Judge. *Held* that the Sub-Judge had no jurisdiction and the suit should be brought in the District Court.—KENCHA HANUMIA v. NARAYANASAMI MOODLIAR 174

JURISDICTION—*Code of Criminal Procedure (Act X of 1882) Sch. II., as amended by Act X of 1886, s. 17—False charge of offence punishable with seven years' imprisonment—Notice through lawyer.*] The offence of theft in a dwelling-house (Penal Code s. 380) is by the amendment made in Sch. II of the Code of Criminal Procedure, by Act X of 1886, s. 17, triable by a first-class magistrate. If an act is theft in the eye of the law, a notice given through a lawyer does not affect the liability of the offender.—THE GOVERNMENT v. SIDDALINGA 269

JURISDICTION, COURT HAVING GENERAL: *see* ATTACHMENT BEFORE JUDGMENT 90

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LIABILITY OF HEIRS: *see* HINDU LAW 271
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LIMITATION—*Limitation Act (XVI of 1877), Sch. II, Art. 132 and s. 19—Stipulation that upon default of payment of interest, both principal and interest should become payable on demand—Acknowledgment—Registration Act (III of 1877), s. 17—Interest—Mortgage-decree—Transfer of Property Act (IV of 1882) ss. 88 and 90—Costs—Code of Civil Procedure (Act XIV of 1882) ss. 206 and 219.*] Where a bond contained a stipulation that on failure to pay interest upon the dates thereby made payable, both principal and interest should become at once due and payable on demand, *held* that such stipulation modified and controlled the previous agreement by which the principal was to be paid on a particular date, and although with reference to such date the suit was not barred by limitation; yet, as the period of limitation should be counted from the date of failure to pay interest which placed the arising of the cause of action beyond the term allowed by the Limitation Act, the suit was barred. *Held further*, that certain receipts produced by the plaintiff related to the debt sued for and were sufficient acknowledgments to prevent limitation barring the claim under s. 19 of the Limitation Act. *Also*, that such receipts did not require registration under s. 17 of the Registration Act (III of 1877). *Further*, whether interest can be claimed for the period after the date on which the principal became repayable, is a question to be determined from the construction of the document; and although the wording may not show an express agreement to that effect, yet if it can be inferred that the principal was intended to carry interest *post diem*, such interest should be allowed. The form of decree on a mortgage should follow the Transfer of Property Act (IV of 1882) s. 88; and under s. 219 of the Code of Civil Procedure every judgment should contain an order as to costs. The form of decree and proper order for costs in the present case pointed out.—MANAVATI BOPANA *v.* RAMA SHETTY PUTAPA SHETTY 309

LIMITATION—*Instalment bond—Proof of discharge—Evidence.*] An instalment bond dated the 12th September 1889 was put in suit on the 15th October 1892. It contained a clause making the whole amount due payable on default of payment of any instalment: and another stipulation that the whole amount should be payable within a month from date of default. The first instalment became due on the 12th October 1889. According to the defendants it was not paid, and the plaintiff offered no proof of payment. *Held*, that the suit was not barred by limitation, as time did not begin to run until the expiration of the one month's time allowed for payment from date of default; and as this did not expire until the 12th November 1889, and the suit was filed within three years from that date, it was not barred. *Held also*, on the evidence, that the payments alleged by the defendant appearing to have been made in satisfaction of a previous bond, subject of other litigation, and the discharge of the bonds sued on not having been satisfactorily established by the defendants, the defence failed throughout.—VEERAPA *v.* ANJANAPA 151

LIMITATION—*Construction of Limitation Act—Appeal—Copy of decree—Time allowed by judge for filing copy.*] Where an appeal was present-

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ed on the 72nd day after decree was passed, but the appellant was entitled to a deduction of 45 days for obtaining copy of the judgment, *Held* that his appeal was within time, although he had not filed a copy of the decree, but did so subsequently within the time. The Limitation Act must be construed in such a manner as to retain the remedy and not to lose it. *Quære*, whether the District Judge was correct in granting ten days time for the filing of a copy of the decree. A memorandum of appeal without such copy is incomplete and liable to be returned; and it is not clear that a judge can by his order extend the time prescribed by the Limitation Act for the filing of appeals in a correct form.—DENIA *v.* NARAINAPA 57

LIMITATION ACT (XV OF 1877), SCH: II, ART. 132 and s. 19: *see* LIMITATION 309

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" " SCH. II, ARTS. 110, 120, 132: *see* JODI ... 52

" " SCH. II, ART. 120: *see* MAHOMEDAN FAMILY 276

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LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 57, 59 and 115—*Second appeal on facts.*] The plaintiff advanced Rs. 900 to the defendants as part purchase money of two coffee estates which the defendants failed to convey and sold to other parties. The plaintiff sued to recover his advance. *Held* that Sch. II, Arts. 57 and 59 of the Limitation Act (XV of 1877) did not apply; but the case came under Art. 115 and was not barred as it was brought within three years from the time the contract was broken. *Also*, there was no question of partnership. The suit was for refund of advances of purchase-money on the ground of breach of contract by failure to convey. *Further*, the genuineness of exhibits was a question of fact as to which the High Court would not interfere unless satisfied that the lower courts had drawn strained conclusions from the evidence or from the circumstances of the case.—B. VENKATARAMANIA *v.* HASIM KHAN SAIB 303

LIMITATION ACT (XV OF 1877), ss. 57 and 12—*Application for leave to appeal as a pauper—Minor appellant.*] An application for leave to appeal as a pauper does not come within s. 5 of the Limitation Act (XV of 1877) which applies only to appeals and applications for review. But where the pauper appellant is a minor, he is protected against limitation by s. 7 of the Limitation Act.—MEENAKSHAMA *v.* SUNDRESHIA 331

LIMITATION ACT (XV OF 1877), s. 20—*Interest—Appropriation of payments.*] Where a sum of money was paid by a debtor to his creditor, which was not appropriated by the former to either principal or interest, both of which were due at the date of payment, *Held* that an appropriation by the creditor of the money so paid, to account of interest is not sufficient under s. 20 of the Limitation Act (XV of 1877) to prevent the debt from being barred. Under the section the interest must be paid as such: the debtor must know and intend that it is for the payment of interest that he gives the money.—NADIG NARANAPA *v.* DASA 211

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Mahazar—*Partition-deed—Registration—Registration Act (III of 1877), ss. 17 and 49—Minority—Evidence—Theft—Attendant circumstances.*] If a mahazar is of the nature of a partition-deed of immovable property its registration is compulsory and without registration it could not be received in evidence. *Further*, if the accused were a minor when it was executed it would not be binding on him. Both the fact of partition and that such partition was effected when the accused was of full age appearing by abundant evidence on record independently of the mahazar, rendered its consideration immaterial. The accused unjustifiably carried away coffee under a mere assertion of right and the way they disposed of it showed they acted dishonestly with a view to get wrongful gain for themselves and cause wrongful loss to those lawfully entitled. Their act therefore amounted to theft.—*In re* Mekeri Media 343

Mahazar—*Partition-deed—Registration—Registration Act (II of 1877), ss. 17 and 49—Partition of family property among Coorgs—Yejman—Dishonest intention.*] A mahazar of the nature of a partition-deed affecting immovable property requires registration under s. 17 of the Registration Act (III of 1877) and not being so registered cannot under s. 49 of the same Act be received in evidence: nor can secondary evidence of its contents or of the partition effected by it be received. Partition of property among Coorgs is not enforced by the courts and cannot be effected privately except with the consent of all the members of the family. Two brothers could not therefore arrogate to themselves the power to divide property in which other brothers and nephews were interested without the consent of all nor while the nephews were minors incapable of legally acting for themselves. *Held*, therefore, that one of the brothers being the yejman of the family, even though he acquiesced for a time in the alleged partition, was at liberty to resume the management of all the family property and his removal of coffee under such circumstances could not be said to be dishonest within the meaning of the Indian Penal Code.—Chenanda Beliapa v. Karumbia 344

Mahomedan family—*Sale of immovable property—Duty of purchaser to enquire into title—Compensation—Limitation—Limitation Act (XV of 1877), Sch. II Art. 120—Partition—Specific Relief Act (I of 1877), s. 12—Transfer of Property Act (IV of 1882), s. 44—Costs.*] Where the widow of a Mahomedan sold some immovable property belonging to the estate of her deceased husband to her son-in-law, who transferred such property to one *J S* informing the latter at the time that the property had belonged to his deceased father-in-law, *Held* that, having had such notice, it was the duty of *J S* to have ascertained who the representatives of the deceased proprietor were and whether they had all acquiesced in the sale. Not having done so, and there being nothing to show that they were even aware of the sale, all that passed to a purchaser at court-sale in execution of a decree against *J S* was the interest of *J S* and of his mother-in-law in the said property. *Further* that, assuming the house on the land to have been built by the mother-in-law, it must have been so prior to the sale by her to her son-in-law, which took place in 1885, more than six years before the suit. The plaintiff's (court-purchaser's) claim for use and occupation would therefore be barred under the Limitation Act (XV of 1877), Sch. II Art. 120. *Also held*, that the plaintiff could not claim a specific share of the house but only the money value of the 299/768th

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share he was declared entitled to. It would be impossible to divide the house so as to give him this share. Where a dwelling-house cannot be divided without destroying the intrinsic value of the whole house, the person claiming a share thereof must content himself with its money value. Section 44 (second paragragh) of the Transfer of Property Act (IV of 1882) provides that when the transferee of a dwelling-house is not a member of the family, he shall not be deemed to be entitled to joint possession or other common or part enjoyment of the house. This provision, which is not opposed to any rule of Mahomedan law within the meaning of s. 2 (*d*) of the Act, also militates against the plaintiff's claim to a specific share. *Further,* as to costs, the principle is that costs should follow the result and the plaintiff is therefore entitled to proportionate costs unless there are special circumstances disentitling him to the same. He was a purchaser at a court-sale. The defendants did not restrict their claims to their respective shares, but impugned the fact and validity of the original sale in its entirety and set up a false plea of gift of the whole house. Under such circumstances they should pay the plaintiff his proportionate costs in the lower court and bear their own. As the respondents (defendants) resisted the whole of the plaintiff's claim even in appeal, each party should bear their own costs of the appeal.—BANSILAL RAMARATHAN *v.* MAHOMED SALIA SAIB 276

MAINTENANCE: *see* CODE OF CRIMINAL PROCEDURE 264

MALICIOUS PROSECUTION—*Damages—Onus on plaintiff—Evidence.*] In a suit for damages for malicious prosecution, the plaintiff must prove both malice and want of probable cause. The onus does not lie on the defendant to establish that his complaint was true. Where it is only proved that the plaintiff's house had been searched and that he had been kept in custody, it cannot be inferred that the defendant did not act *bonâ fide.*—DEVE GOWDA *v.* KEMPE GOWDA 44

MANAGER, POWERS OF: *see* HINDU LAW 38

MARRIAGE—*Contract on behalf of adult—Damages.*] The plaintiff sued to recover liquidated damages from the defendants for the breach by them of a contract to give their daughter in marriage to the plaintiff's cousin, who was no party to the agreement or to the suit, although an adult *sui juris. Held,* that the plaintiff had no right to negotiate for his cousin's marriage nor to sue for damages for the breach of any contract independently of him. Moreover the plaintiff did not assert that he had suffered any direct loss from the alleged breach of contract; and any prospective outlay he might have in marrying his cousin to another girl than the defendant's daughter, would be too remote to be taken into consideration as damages.—MUNI BOYEE *v.* CHIKABALANA BOYEE 150

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MINOR APPELLANT: *see* LIMITATION ACT... 331

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MINOR—*Suit to set aside decree—Limitation—Limitation Act (XV of 1877), Sch. II Art. 123.*] In 1870 a suit was brought by *M* to set aside a will made by *B* and to obtain possession of the latter's property.

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To this suit *N* was a party defendant, and being then a minor was represented by his father and guardian *C*. The suit was settled by arbitration, and a decree was given in terms of the award, under which *M* took the property and paid Rs. 1,400 to *N* by his father and guardian *C*. *N* attained his majority in 1884 and in 1891 filed a suit against *M* to recover the property. *Held* that art. 123 of sch. II, Limitation Act (XV of 1877) did not apply: and the suit was barred as it was not brought within three years from the date the plaintiff attained majority. THUMBOO CHETTY, C. J.—This is not a suit against the executor to the will of the deceased *B* or his heirs. It is brought on the allegation that *M* took wrongful possession of the estate and was a wrong-doer. He got the will set aside by an award to which the plaintiff's father and guardian was a party and the alleged wrongful possession commenced more than twenty years prior to the institution of the suit. The suit cannot be regarded as one by a legatee for recovery of his legacy under the Limitation Act, Sch. II Art. 123. RAMACHENDRA IYER, J.—The decree passed in the former suit was *primâ facie* binding upon the plaintiff as he was a party to it. No circumstances have been proved which can raise a suspicion, much less a presumption, that the plaintiff's father did not protect his interests, that the then plaintiff's case was fictitious and that there were no grounds for a compromise. No fraud has been established and no ground has therefore been made out for setting aside a decree made by a competent court.—KOOTHARAI NANJAPA *v.* KOOTHARAI MULANA 86

MISCONDUCT OF ARBITRATOR: *see* CODE OF CIVIL PROCEDURE 199

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MORTGAGE BY A PERSON HOLDING NO TITLE: *see* HEIRS OF A MARRIED WOMAN 55

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MUDAMI, CONSTRUCTION OF THE WORD: *see* MUTWALI 273

MUNICIPAL RULES: *see* HACKNEY CARRIAGE REGULATIONS 252

MURDER: *see* INDIAN PENAL CODE 233

MUTWALI—*Power to appoint and dismiss Pesh Imam—Construction of word "Mudami."* *Held* that, it being clear the plaintiff was appointed Pesh Imam by the Kazi and the community, it must be conceded they had the power also to dismiss him. *Also*, the word *Mudami* in the document of appointment should not be construed as "eternal" or meaning that the appointment was to last for life. It shou'd be given the current meaning of "continuously" and its place in the construction of the sentence shows that it referred to the manner in which the duties were to be performed and not to the duration of the term of office.—HAFIZ PESH IMAM ABDUL KAREEM SAIB *v.* MEER ISMAIL SAIB ... 273

MYSORE GOVERNMENT STAMP BEARING SEAL OF BRITISH RESIDENT'S TREASURY: *see* STAMP ACT 180

MYSORE LAND REVENUE CODE (REGULATION IV OF 1888), s. 221—*Bar to civil suit—Shanbog's office.*] The Mysore Land Revenue Code (Regulation IV of 1888), s. 221, is no bar to the cognizance by the civil courts of a claim for share of the income of a Shanbog's office, such claim being apparently founded upon a contract or some family arrangement.—KRISTNAPA *v.* NARANAYA 194

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NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 4, 79 and 80—*Separate promissory note for interest deducted in advance—Consideration—Equitable relief—Interest—Costs.*] Where the defendant being fully aware of the nature of the transaction and entering into the agreement with his eyes open, consents to interest being deducted in advance and agrees to take it back as a separate loan for which he gives a second promissory note, he has no right to any relief from the law. A promissory note payable by monthly instalments which carries interest for eight months only from date of execution, but is silent as to subsequent interest, falls within the definition of a promissory note given in s. 4 of the Negotiable Instruments Act (XXVI of 1881) and would carry interest at the contract rate under s. 79 of the same Act until tender or realisation. Plaintiffs who partially succeed on appeal must pay the defendant's costs in the original court on the amount disallowed and on appeal should receive from the respondents costs on the amount allowed in excess of what was decreed by the lower court.—POORNAM CHUND *v.* BOWEN 283

NOTICE : *see* EJECTMENT 162

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PARTITION OF FAMILY PROPERTY AMONG COORGS : *see* MAHAZAR ... 344

PARTITION-DEED : *see* MAHAZAR 343, 344

PARTITION—*Code of Civil Procedure (Act XIV of 1882), s. 396—Procedure—Jurisdiction—Mysore Civil Courts Regulation of 1883, s. 10.*] The plaintiff purchased at court-sale one-sixth share, undefined and unascertained, of certain property and sued the joint owners for partition and possession of such share, in the munsiff's court. The entire value of the whole property was beyond the jurisdiction of

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the munsiff under s. 10 of the Mysore Civil Courts Regulation of 1883. *Held* by the Chief Court (THUMBOO CHETTY. C. J. and C. MEENACSHAYA, J., RAMACHENDRA IYER, J. *dissenting*) that the munsiff had not jurisdiction. For purposes of partition the court must exercise jurisdiction over the whole house which was the subject-matter of the suit and before putting the plaintiff in possession of his one-sixth share, had to determine which portion of the house was to be given to the plaintiff and whether the share so given to him represented the full market value of his one-sixth share in the whole house. To enable the court to do this it might be necessary to award payments of sums by one sharer to another to equalise the value of the shares of the several co-parceners, following the procedure indicated in s. 396 of the Code of Civil Procedure. The case is distinguishable from those where a suit is brought for an ascertained share or portion of property, when no general partition is required, and also from suits for partition of immovable property paying revenue to Government, which are excluded from the purview of s. 396 of the Code of Civil Procedure. In suits for partition of lands not paying rent to Government the procedure laid down in that section must be followed: and to enable the court to act up to its provisions, there must be jurisdiction over the whole subject-matter. As stated by the Madras High Court in *Nagamma* v. *Subba* (I. L. R. 11 Mad., 197) the court should have at its disposal, for the purposes of the suit, the whole property to adjudicate upon the plaintiff's claim. *Per* RAMACHENDRA IYER, J.—I fail to perceive how s. 396 of the Code of Civil Procedure, which enables a court to make a partition through commissioners affects the question of jurisdiction. * * The mode in which the court should proceed to decree in such cases is laid down by the Calcutta High Court in *Bhoobun Moyi Dabea* v. *Shurut Sundery Dabea* (I. L. R. 12 Cal., 279) * * * . I am further of opinion that the section applies to all suits for partition of immovable property, notwithstanding the use of the words "immovable property not paying revenue to Government." * * * The question "What is the subject-matter of a suit for partition?" is replied to by WEST, J. in *Lakshman Bhatkar* v. *Baraji Bhatkar* (I. L. R. 8 Bom., 34) as "the jural relation between the parties as alleged by one and denied by the other, and that, in the case of a single aliquot part, is the ownership of such part." Upon this principle it was always held that a suit for partition was cognisable by a court if the value of the share sued for was within its jurisdiction, although the value of the whole property was beyond it. This rule was departed from in regard to suits by Hindu co-parceners for division of family property, for the reason that in such a suit the court had more to do than merely give the plaintiff possession of his share. This duty is not cast upon a court in other suits for partition. If a Mussalman sues for his shares or if a joint tenant sues for his share, what is his share is the only question and if the value of that share is within the cognisance of a munsiff, I do not see why he should not try the suit.—VENKATARAMANA SHETTI *v.* BHERI SHAMANA 70

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PENAL CODE (ACT XLV OF 1860), s. 320 (8): *see* CODE OF CRIMINAL PROCEDURE 230

PENAL CODE (ACT XLV OF 1860), s. 363: *see* GUARDIANSHIP... ... 222

PENAL CODE (ACT XLV OF 1860), ss. 101, 352 and 358—*Assault on provocation—Conviction against findings—Conviction on surmise or inference not warranted by facts.*] A complaint was made of assault punishable under section 352 of the Indian Penal Code. The magistrate found that the complainant first assaulted the accused and he further expressed his disbelief in the story of the prosecution witnesses. He, however, convicted the accused under s. 358 of the Indian Penal Code of assault on grave and sudden provocation, considering that they *might have*, after they were beaten, returned the blows. *Held* that the inference of the magistrate was not warranted by the evidence nor by the magistrate's first finding and a conviction could not be based upon a mere surmise or inference not warranted by facts. *Further* (*per* KRISHNA MURTI, J.)—The accused were clearly justified in exercise of the right of private defence under s. 101 of the Indian Penal Code even if they had assaulted the complainant in return for the blows which he gave them.—CHUDANA *v.* THE GOVERNMENT 241

PENAL CODE (ACT XLV OF 1860), ss. 379 and 403—*Theft—Criminal misappropriation—Conviction on surmise or inference not warranted by facts—Detention—Possession.*] The accused was convicted of theft of two bullocks, and on appeal the District Magistrate altered the conviction to one of criminal misappropriation under s. 403 of the Indian Penal Code, holding that there was no theft proved, but that it appeared to him the accused finding the bullocks straying unattended and not knowing whose they were had detained them dishonestly. *Held,* that the District Magistrate having found the accused had not stolen the bullocks should have acquitted him, as there was no evidence of their having strayed, or of the accused having taken possession of them in the manner surmised by the District Magistrate. The magistrate was not justified in setting up a case quite distinct from that alleged for the prosecution, when the latter failed. *Further* (*per* KRISHNA MURTI, J.)—Under s. 403 of the Indian Penal Code there must be a completed appropriation or conversion to the offender's own use. Simple possession is not sufficient. In the present case, the finding of the District Magistrate that the bullocks had been merely detained is not sufficient to constitute the offence of misappropriation. —THIMMARAYA *v.* THE GOVERNMENT 245

PENAL CODE (ACT XLV OF 1860) ss. 188 and 341—*Wrongful restraint—Breach of District Magistrate's order.*] The accused, who was in possession of a *mutt* prevented the complainants from entering and performing a ceremony there. They were thereupon convicted of wrongful restraint and sentenced to fine under s. 341 of the Penal Code. The magistrate laid stress upon an order said to have been passed by the District magistrate, in defiance of which the accused had resisted or prevented the complainants from performing the ceremony. *Held* that, if the complainants possessed equal rights with the accused and others as regards the *mutt,* the accused might be liable to pay damages for any unlawful interference with such rights, but could not be convicted of any offence. The order of the District magistrate did not affect the case. If the District magistrate passed any order which the accused was bound to obey, and if he acted in defiance of the order he might be punished under s. 188 of the Penal Code.—SUBANACHAR *v.* THE GOVERNMENT 249

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PENAL CODE (ACT XLV OF 1860), ss. 323, 340, 352, 357—*Assault—Wrongful confinement—Code of Criminal Procedure (Act X of 1882), s. 345—Compoundable offence.*] Where the accused, in course of an assault committed by him on the complainant, pushed and dragged the latter towards the *pial* of a house, *Held* that such acts of the accused, being done in the course of committing the assault, could not aggravate the offence into one punishable under s. 357 of the Penal Code as an assault committed in attempting to wrongfully confine the complainant; and that a compromise entered into by the parties was legally admissible, the offence being one of simple assault, compoundable under s. 345 of the Code of Criminal Procedure.—RAMANA *v.* THE GOVERNMENT 253

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RAILWAY ACT (IX OF 1890)—*Railway Act (IV of 1879)—Trespass on line—Fencing.*] The owner of a cow that had trespassed on the railway near Kumbalgode in the Mysore State was convicted and sentenced under s. 125 of the Indian Railway Act (IX of 1890). *Held* that Act IX of 1890 was not in force in Mysore, but Act IV of 1879. As the latter Act imposes the condition precedent that the fencing on both sides of the railway line should be in a proper condition before a person can be punished for trespass, the conviction was bad; but the magistrate was directed to ascertain the question of fact necessary and proceed in due course of law.—THE GOVERNMENT *v.* VENKATARANGIA 240

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REFUSAL BY MAGISTRATE TO PERMIT PROCESSION—*Powers of revision—Procedure.*] The District Magistrate refused a license for a marriage procession on the ground that it was against *mamool*. *Held*, that the Chief Court could not on revision interfere with the order and direct the magistrate to grant a license. But, when magistrates exercise such powers, they should state clearly the provisions of the law under which they proceed and the circumstances or facts which move them.—*In the Matter of* TIMACHARI 251

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RES JUDICATA—*Mortgage—Reversioner.*] *V* died leaving a house to *J* for life with reversion to *T*, giving the latter also a right to maintenance and joint possession. The house at time of the testator's death was subject to a mortgage with possession. *J* sold the house to *R* who paid off the mortgage. *T* then obtained a decree establishing her right to occupy the house under the will. The court refused to go into the question of the validity of the sale or the right of *R* to a refund of purchase money should *T* obtain a decree. *R* then sued *T* for one-half of the mortgage money which he had paid. *Held*, that the second suit was not barred as *res judicata*; that *J* succeeded to all the property of the testator and it was not shown that the assets were insufficient to enable the mortgage to be redeemed. The reversionary heir, *T*, could not be called upon to pay or contribute towards the mortgage-debt.—GEEVOOBOYI v. SRINIVASA RAO 9

RES JUDICATA—*Cause of action—Defence raised for the first time in appeal.*] By a razinama decree the defendant was given the option of raising the level of his yard so as to allow his house-water to flow freely through a certain drain provided he did not thereby injure the tenements of the plaintiff and co-defendants and the latter on their part were not to prevent the plaintiff and defendant from cleansing the drain. Subsequently the defendant, who did not exercise the option so given him of raising the level of his yard, allowed the drain to be choked and become a nuisance to the plaintiff who sued for abatement of such nuisance. The defendant in appeal raised the plea of *res*

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judicata on the previous razinama decree. *Held* by the Chief Court, but on different grounds, that the plea was bad and the defendant's appeal should stand dismissed. *Per* THUMBOO CHETTY, C. J.—Subsequent to the razinama decree, which left it optional with the defendant to raise the level, there has been an accumulation of sewage and dirty water, causing nuisance, inconvenience and ill-health to the plaintiff and the inmates of his house, so as to entitle the plaintiff to litigate the matter again and get a peremptory order directing the defendant to do the needful to remove the nuisance and obstruction complained of in the plaint. In this view, the former decree is no bar to the present suit. *Per* KRISHNA MURTI, J.—In the munsiff's court the defendant allowed the case to be dealt with *ex parte*. There was no defence and the bar of the previous decree was not pleaded. * * It is, in my opinion, too late in the day for the appellant to take his objection for the first time in this court and ask to be heard on the plea of bar by means of a previous decree, which document does not seem to have been even exhibited in the lower court.—RAMASWAMY CHETTY *v.* CHEPALY KRISHNIA 136

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REVENUE SALE—*Suit by purchaser for possession—Mysore Land Revenue Code, ss. 187 and 221 (c).*] The purchaser at a revenue-sale confirmed by Government under certain conditions sued for possession of certain lands to which he alleged a right under the terms of the confirmation. *Held*, that if the plaintiff were entitled to possession of the lands sued for, he must obtain it through the Deputy Commissioner under s. 187 of the Mysore Land Revenue Code and that a civil suit for the purpose is barred by s. 221 (*c*) of the same Code, the words of which embrace a claim by a purchaser to be put into possession of land purchased by him at a revenue-sale. *Malle Gowda v. Cheluviah* (15 M. L. R., 129) *distinguished.*—VENKATA KRISHNIA *v.* SUBARAYA 18

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SALE BY ONE OF JOINT OWNERS—*Refund on failure of consideration—Transfer of Property Act (IV of 1882), s. 55 (2)—Contract Act (IX of 1872), ss. 65 and 37—Survival of right of action on contract—Costs.*] *A* sold certain property from which the purchasers were ejected by persons who claimed it as their family property. On suit to recover possession a decree was given to the purchasers, for one-half only of the property, that being found to be *A's* share. After *A's* death a suit was brought to recover the half purchase-money from his estate. *Held*, that under s. 55 (2) of the Transfer of Property Act (IV of 1882) *A* must be deemed to have contracted that the interest which he professed to sell actually existed and that he had power to transfer the same; whence there was an implied contract under s. 65 of the Contract Act (IX of 1872) on his part to refund to the purchasers the price of the half share in respect of which the sale was held to be invalid. Mayne's Hindu Law (*see* s. 341) also lays down that when sale of joint property by one co-parcener is set aside at the instance of the other co-parceners, the latter should refund to the buyer the purchase-money if it went to the joint fund or otherwise benefited the joint property. *Held further*, that as rights and liabilities arising out of contract survive to and against the legal representatives of the contracting parties unless a contrary intention appears from the contract (Contract Act, s. 37), the obligation in the present case survived and the legal representatives of *A* were bound to discharge it to the extent of the assets inherited by them. On the facts of the case the decree of the lower court was modified as regarded some of the defendants and the order as to costs was reviewed, the latter being made payable by the parties in proportion to the amounts allowed and disallowed.—KRISHNIA *v.* NARINA 318

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SMALL CAUSE SUIT—*Decree on illegal evidence—Material irregularity—Revision.*] Where the decree in a small cause suit was not supported by any legally proved or admitted evidence, and the judge acted upon a document not legally proved, it was *held* that his irregularity went to the very root of the case and vitiated the whole proceedings. Such a case was therefore a fit one for the exercise of revisional powers and the Chief Court set aside the decree and remanded the suit for re-hearing.—COOPOOSAWMY CHETTY *v.* RAMASWAMI IYER 209

SMALL CAUSE COURT—*Jurisdiction—Suit for produce—Dispute as to right to land.*] *Held,* that where there are *bonâ fide* disputes as to right to land of which the plaintiff is not in possession, a suit by him to recover the produce or for damages for wrongful detention cannot be brought in the Small Cause Court.—VENKATACHAR *v.* VISHAKANTIA... ... 214

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STAMP ACT (I OF 1879), s. 50—*Reference by Collector as to nature of document—Proper object of reference under the Stamp Act.*] The object of s. 50 of the Stamp Act (I of 1879) is to obtain a declaration as to the proper amount of duty or penalty payable on a document, not to determine the nature of the instrument. A reference the object of which is to elicit the opinion of the court as to whether a document is a promissory note or not, does not come within the purview of the section and cannot be entertained.—MUSTOORAPA *v.* VENKATAPA ... 184

STIPULATION THAT, UPON DEFAULT OF PAYMENT OF INTEREST, BOTH PRINCIPAL AND INTEREST SHOULD BECOME PAYABLE ON DEMAND: *see* LIMITATION ... 309

SUIT FOR PARTITION—*Share in family property—Valuation of suit—Jurisdiction—Form of plaint.*]—KHAJEE BADARUDEEN SAB *v.* OOSMAN SAB App. i

SUIT FOR PRODUCE: *see* SMALL CAUSE COURT 214

SUIT FOR PRODUCE OF LAND—*Jurisdiction of Small Cause Court—Valuation of suit.*] A suit for produce of land claimed by the plaintiff and involving a *bonâ fide* dispute as to title, should rightly be tried

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as a regular suit for possession and damages. But such a suit should not have a court-fee as if it was one for declaration of title. If the plaintiff be out of possession, the suit ought to be valued as one for possession and mesne profits.—MUDIYA v. THOPA 43

SUIT BY PURCHASER FOR POSSESSION: see REVENUE SALE 18

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SUMMARY TRIAL—*Code of Criminal Procedure (Act X of 1882), ss. 263 and 355—Record of evidence—Revisional powers of High Court.*] In a summary trial where no appeal lies, a magistrate need not make a record of the evidence of the witnesses. Section 355 of the Code of Criminal Procedure (Act X of 1882) must be read with s. 263. *Also*, whether a finding is opposed to the weight of evidence and the probabilities of the case is a point which the court would not ordinarily go into on revision and would especially be unable to decide in a summary case, where no record of evidence exists.—*In re* A. R. PILLIAR MOODELLIAR 301

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TRADING—*Shop-Tax.*] Where the grower of betel leaves in his garden, situate elsewhere than in the village where he resides, collects the produce, stores it in his house and hawks it about to several places, *held* that such business does not amount to trading in the article. The betel-grower's house is not a shop because he occasionally sells a few leaves there, nor is he liable to be assessed with shop-tax.—ASWATHA NARAYANA SASTRY v. CHOONCHA 66

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